

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 24-CR-206(NCM)
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-against- : United States Courthouse
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HALIMA SALMAN, : Thursday, August 7, 2025
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Defendant. : 10:00 a.m.
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TRANSCRIPT OF CRIMINAL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE NATASHA C. MERLE
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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A P P E A R A N C E S: (Continued.)

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Oral Argument

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1 (In open court.)

2 COURTR00M DEPUTY: Criminal cause for oral
3 argument in United States of America versus Halima Salman,
4 Docket No. 24-CR-206.

5 Would you all please state your appearances for
6 the record starting with the Government.

7 MS. SHAMI: Good morning, your Honor. Assistant
8 United States Attorneys Amanda Shami and Andrew Reich for
9 the Government. We're also joined by an intern in our
10 office, Shriyah Singh.

11 THE COURT: Good morning.

12 MR. REICH: Good morning.

13 MS. EISNER-GRYNBERG: Good morning, your Honor.

14 Federal Defenders by Mia Eisner-Grynberg and Sam
15 Jacobson for Ms. Salman. Also, we are joined by attorney
16 Michael Price from the NACDL.

17 THE COURT: Good morning. Good morning,
18 Ms. Salman.

19 Can you hear me?

20 THE DEFENDANT: Yes, I can.

21 THE COURT: So we're here for oral argument on
22 defendant's pretrial motions and, as I indicated during our
23 last conference, I am particularly interested in the
24 parties' arguments regarding Ms. Salman's motion to exclude
25 evidence at ECF Number 75.

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1 I have thoroughly reviewed the briefing and I want
2 to hear from the parties as to their various arguments and I
3 have a few questions.

4 So I will hear from the parties if they have
5 anything additional to their materials, to their briefing.
6 And, if not, then we can move to the next motion. I won't
7 be covering defendant's CIPA motion today; so I will be
8 covering the other motions instead.

9 And I want to start with ECF Number 75,
10 defendant's motion to exclude evidence. Specifically, the
11 photograph of the alleged military training document.

12 Is it going to be you, Ms. Eisner-Grynberg?

13 MS. EISNER-GRYNBERG: Yes, Judge.

14 THE COURT: I will give you an opportunity to make
15 any additional arguments that you may want to make for this
16 motion.

17 MS. EISNER-GRYNBERG: Thank you, Judge.

18 It's our position that under various rules of
19 evidence, both the photograph of a training document is not
20 admissible. Most importantly, the Government has not and
21 cannot sufficiently authenticate the document, and the
22 Government cannot prove any exclusion or exception to the
23 hearsay rule.

24 Just briefly on the authentication point. Nothing
25 about this document makes it more likely to be authentic

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1 than inauthentic and that's what the Government, as a
2 proponent of the evidence, has to show. The Government has
3 put forth a document that is partially typewritten,
4 partially handwritten, and that is signed by an unknown
5 person who the Government has never even claimed to
6 identify, Umm Yousef. The Government has not put forward
7 any evidence or proffered any witness that can tell us this
8 is a real person, a person with an identity, a person who is
9 in a position of authority to sign a document or write a
10 document such as this, and the document lacks all other
11 indicia of reliability.

12 The Government has not put forward evidence of any
13 witness with any knowledge that any of the contents of that
14 document are true. They are not calling as a witness the
15 supposed declarant, Umm Yousef. They're not calling as a
16 witness any person who claims to have ever seen Ms. Salman
17 at this training. They have no evidence that Ms. Salman has
18 admitted to the training; in fact, they have the opposite,
19 she's denied it. They have no witness whose ever claimed to
20 have heard her state that she's been to the training. They
21 have no witness who was present for the training. The
22 document is not dated and there's no location on it. The
23 document doesn't have a stamp which is the critical
24 identifying mark of genuine documents like this.

25 Without that information, with nobody to confirm

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1 that the document is real. That a real person wrote it.
2 That it was made at a time where trainings such as this were
3 held. That it was made at a place where documents such as
4 this were held; or that any person can corroborate any piece
5 of the document aside from what is known by others, which is
6 Ms. Salman's nickname, the document cannot be authenticated.

7 The Second Circuit case of *United States v. Vayner*
8 is dispositive here. That case found in a different
9 circumstance the document that purports to be about an
10 individual but is not written by that individual, that
11 contains only information that is known by others and known
12 specifically by others who have a reason to fabricate such a
13 document is not sufficient to authenticate the document.

14 As for hearsay, the Government --

15 THE COURT: May I ask you about authenticity
16 before you move on?

17 MS. EISNER-GRYNBERG: Yes.

18 THE COURT: I know a lot of the issues you raise,
19 which I think are real issues, and I'll hear from the
20 Government on them. And obviously, it is the Government's
21 burden to prove authenticity but is there any reason to
22 believe the document is fake aside from the speculation
23 about the benefits that the husband would gain from forging
24 such a document?

25 MS. EISNER-GRYNBERG: Yes.

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1 As a step back, there is no evidence to suggest
2 that it's real. The Government has not put forth any
3 similar document that has itself been authenticated. There
4 is nothing suggesting that this document or any document
5 that looks like this document has ever actually been awarded
6 to or written about a person who actually attended a
7 training.

8 THE COURT: Didn't they say they're going to put
9 forth other women, I'm paraphrasing, but I believe they're
10 going to put forth women who know something about the
11 training documents. They're going to put forth FBI agents
12 who supposedly know something about the document.

13 Are you saying that that's not adequate?

14 MS. EISNER-GRYNBERG: I'm saying that's not
15 actually what the Government has proffered. The Government
16 says they have a female witness who is present in Syria at
17 the time that Nusaybah Khatiba, the women's brigade, began
18 and has seen documents like this. They have not proffered
19 that this person was the recipient of such a document or the
20 author of such a document, that she attended any of these
21 trainings or held any of these trainings. There are known
22 witnesses who presented these trainings and that's not who
23 the Government's calling here.

24 So for the Government to say we have a witness who
25 is a woman who has no familiarity with this document, and

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1 has not received or authored such a document but has seen
2 documents like this is not sufficient to prove
3 authentication. Neither has the Government put forth any
4 expert witness or agent who has experience with this
5 specific type of document. The Government has said that
6 they have an ISIS document expert, unnamed, who will opine
7 on this document. The only witnesses that the Government
8 has called in cases like this whose offered that kind of
9 testimony have themselves noted that many documents of this
10 specific type are fraudulent, specifically, ISIS documents
11 that have a typewritten portion and a handwritten portion
12 have been found by the Government's expert to be fraudulent
13 time and time again. And the reason that that's the case is
14 because the bureaucracy that was in place widely
15 disseminated documents of this type making them easy to
16 fabricate. This document is unlikely to be real,
17 specifically, because it lacks the stamp that genuine ISIS
18 documents have. Time and again, and in district courts such
19 as in *Musaibli*, courts have found that the ISIS stamp is
20 what tells us the document is real. And that's because that
21 stamp tells us various important things about the provenance
22 of the document. It tells us specifically where it was
23 issued, when it was issued, by whom, and that person's
24 authority to issue the document and none of those are
25 present here.

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1 On the Government's comparators, which are
2 themselves unauthenticated, seven of the eight of them have
3 such a stamp. Most of them say, this is the Government that
4 issued this document on this day, at this location, by this
5 actual person. And from that information, the trier of
6 fact, and here the Court, can say this document is more
7 likely to be real because we know where it came from and who
8 authored it and who they were and when and where it was
9 made. None of that is present here.

10 We do not know if this document was made at a time
11 or place where trainings even existed, and we do not know if
12 this document was made at a time or place that Ms. Salman
13 was in those places. So without any of that corroborating
14 information, there's simply nothing here that suggests that
15 it's real and several factors that suggest that it's fake.

16 THE COURT: So the Government, obviously, has an
17 argument under §901(b)(4) about the circumstances of the
18 seizure. And I assume that other evidence was found on the
19 phone that they think lends that is more likely to be
20 authentic or at least authentic enough to get in front of a
21 jury.

22 Is your argument that the surrounding factors for
23 this search or the seizure of this photograph is not
24 adequate?

25 MS. EISNER-GRYNBERG: Surrounding circumstances

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1 make it more and more likely that this specific document is
2 real. What the Government says is that this document was
3 found on a cell phone that was collected by U.S. military
4 forces from the person who is believed to be Ms. Salman's
5 husband. And that it was located in his phone in an area
6 where his purportedly genuine documents are. If you compare
7 those documents to this document in the same way, it
8 demonstrates why this document is not real. The documents
9 that they're talking about all contain an ISIS stamp that
10 says when it was issued, where it was issued, by whom, and
11 that person's position of authority.

12 And they contain specific corroborative and
13 corroborated information about Ms. Salman's husband; for
14 example, the narrative portion that talks about where he was
15 on a certain day. Why he was not present for military
16 service on that day. What happened when he came to a
17 hearing to discuss where and why he was not present at that
18 hearing. None of that is present here.

19 The fact that this document is also on the phone
20 that contains documents that are more likely to be true does
21 not lend any legitimacy to this document. A person can
22 certainly possess any number of real documents and also a
23 fake document. And the fact that this one lacks the
24 distinctive characteristics of the real documents or the
25 more likely to be real documents is dispositive.

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1 THE COURT: Okay.

2 MS. EISNER-GRYNBERG: On the hearsay point, even
3 if the Court finds that this document reaches the bar for
4 authentication which, again, we'd say it doesn't on the
5 papers. But, at a minimum, requires a hearing where these
6 witnesses can come forward and be cross-examined about who
7 they are and why they believe the opinions that they're
8 making are true. Even if the Court, after a hearing, finds
9 the document to be authentic, it is hearsay and it is not
10 admissible and this court is bound by *United States versus*
11 *Al-Moayad*. That's 545 F.3d 139 out of the Second Circuit in
12 2008.

13 *Al-Moayad* and our case are exactly the same. In
14 *Al-Moayad*, there was a document purporting to be by a person
15 with a nickname named "Abu Jihad." And Abu Jihad, like
16 Umm Yousef, was never identified by the Government as a
17 specific person or as a real person or as a person with
18 authority to make this kind of document. In Abu Jihad's
19 documents, Abu Jihad said that Al-Moayad, who he did not
20 call Al-Moayad, he called him by a nickname, just like
21 Umm Katab in our case, is the person who recommended him for
22 admission into al-Qaeda. The Court found that on the record
23 before that Court, there was not sufficient evidence to
24 admit the statement as a co-conspirator statement for the
25 exact same reasons as present here.

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1 In that case, the district court had made no
2 findings, and was unable to find, that there was an
3 existence of a conspiracy at the time the document was made
4 by the unknown Abu Jihad just like the unknown Umm Yousef
5 here and the actual Mr. Al-Moayad just like the actual
6 Ms. Salman here. The Court found, for example, that
7 evidence that Mr. Al-Moayad had previously offered any kind
8 of support to al-Qaeda at a different time than this
9 document was not itself sufficient to establish at the time
10 this document, their document, was made there continued to
11 be a relationship between those people. They found that
12 there was no information that Mr. Al-Moayad had any kind of
13 relationship with Abu Jihad. They found that there was no
14 information that Al-Moayad knew who Abu Jihad was or that he
15 was aware of this document. All of those circumstances are
16 the exact same as here.

17 The Government's alleged corroborative evidence
18 that Ms. Salman had at any time and in any place even
19 tacitly supported ISIS, a characterization that we reject,
20 but simply, for example, by being present in its territory
21 or taking a photograph with its flag at some other time does
22 not support that she was in a conspiracy with whoever
23 Umm Yousef was at the time that this document was made.
24 And, again, the reasons we know that is we do not know the
25 time that this document was made because the Government has

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1 never proffered a time that this document was made. They've
2 proffered a time when the photograph they believe was taken.
3 That's in March of 2018. And they've proffered a front-end
4 date of mid-2017 when Ms. Salman married her husband, who is
5 listed as her husband, in the document. And no evidence as
6 to whether trainings, genuine trainings, actually existed in
7 that time period or in the places where she was.

8 So we have no idea if Ms. Salman ever knew
9 Umm Yousef, if that's even a real person, was in any kind of
10 relationship with her that would give Umm Yousef the ability
11 to recount the things noted in the document. And certainly,
12 there's no evidence that Ms. Salman was aware of this form.
13 We know from the evidence that the Government, the agents,
14 showed it to her and she stated she was not aware of this
15 form and she denied that its contents were true.

16 So there is nothing about *Al-Moayad* that is
17 different in our case. And, in fact, the circumstances in
18 that case were more likely to have established a conspiracy
19 given the evidence in that case that Mr. Al-Moayad had
20 materially supported in that case Al-Qaeda which is not
21 evidence that's present here.

22 Until the Government can establish who Umm Yousef
23 is, that this person is a real person who exists and had the
24 authority to sign a document like this, there cannot be any
25 conspiracy proven between Ms. Salman and a potentially

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1 fictitious person or a person we have no ability to probe
2 whether or not they were real and whether or not they were
3 in a position to sign a document like this one. The
4 Government claims to have witnesses who are present in that
5 time and in that place, and they do not proffer that any of
6 these witnesses can tell us who this person is.

7 The Government says that Ms. Salman must have been
8 in a relationship with this person because she signed her
9 training document, that belies common sense. Documents,
10 graduation documents and the like, are signed all the time
11 by the person who is not the trainer themselves. Nobody in
12 this document purports that Umm Yousef was the trainer
13 herself and no actual trainer is being called by the
14 Government to corroborate who this person is.

15 And finally, the fact that the Government has
16 found other documents that purport to be signed by this same
17 person does not advance the ball either because those
18 documents are themselves uncorroborated.

19 Each of the pieces of evidence that the Government
20 says makes this document more likely to be true and makes
21 the conspiracy between Umm Yousef and Ms. Salman more likely
22 to have existed relies itself on something that's
23 uncorroborated. And until one of those pieces can be met
24 with sufficient evidence that can then downstream
25 corroborate the Government's other claims, this document is

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1 not authentic and its contents are hearsay.

2 THE COURT: Are you going to talk about best
3 evidence?

4 MS. EISNER-GRYNBERG: Yes.

5 Our position that admission of this document also
6 violates the Best Evidence Rule. It's clear that this
7 document is not an original. It appears to be a photograph
8 of one side of a folded-up piece of paper that would, if
9 real, have some corresponding original. That original would
10 be itself the piece of paper. And this document does not
11 meet the exceptions that are otherwise required to admit a
12 duplicate because of the questions about the authenticity of
13 the original itself.

14 THE COURT: Let me confirm I understand.

15 Is the question that you're raising whether the
16 document itself for the Best Evidence Rule whether the
17 original itself is authentic or whether the photograph is an
18 accurate copy of the original?

19 MS. EISNER-GRYNBERG: It's both, Judge. We have
20 no idea if the photograph is an accurate copy of the
21 original because we have no evidence as to the contents of
22 the original.

23 In terms of the original itself, we have no reason
24 to believe that that's authentic for all of the same reasons
25 that I've already given. Missing importantly here is

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1 anything corroborating that this document ever was real or
2 ever had an original because the Government has not provided
3 any supplemental corroborating evidence that we would expect
4 to exist and that did exist in other cases like this such as
5 in *Musaibli* and *Al Jumaní*.

6 In those cases, there existed rosters from the
7 ISIS side of people who had attended military trainings such
8 as this, people who are in a military battalion; people who
9 are being paid for their military service. In this case,
10 the Government found and turned over the contents of a hard
11 drive that they say appear to belong to an ISIS bureaucrat.
12 And missing from that hard drive is any corroboration that
13 this training existed or that Ms. Salman attended it. If it
14 was true that Ms. Salman voluntarily attended a training
15 such as this one, there should be some record, a sign-up
16 sheet, an attendance log, a list on ISIS's side of who the
17 people are that they awarded these diplomas to, a list on
18 the weapons provision side of the weapons that were provided
19 to and when and so on. And because there are none of those
20 corroborating documents, there are questions about the
21 authenticity of the original which require it to be
22 admissible under the Best Evidence Rule.

23 The Government has said in its pleadings, in an
24 unsworn pleading, that they've looked for the original but
25 can't find it. That's not sufficient. The Second Circuit

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1 has told us that in order to find -- in order to use a
2 duplicate, you must have a showing of the diligent, but
3 unsuccessful, search and inquiry. It's not enough to just
4 say, We can't find it so we can just use other evidence.
5 And for all of the reasons that the document is not
6 authentic, it also cannot qualify as a duplicate.

7 THE COURT: What else do they need to show?

8 MS. EISNER-GRYNBERG: They need to show exactly
9 the items that I was just mentioning.

10 THE COURT: No, I'm sorry. For them to establish
11 that they don't have access to the original, I think they're
12 saying it's in Syria, ISIS controls the document; it's been
13 destroyed. Do they need to give me a list of items they did
14 to find the document.

15 What else do they need to do?

16 MS. EISNER-GRYNBERG: That requires testimony of a
17 witness with knowledge as to their search and their
18 inability to find any such document.

19 THE COURT: So if Ms. Shami says, We searched far
20 it; these are the steps we took to search for it that's
21 still not adequate?

22 MS. EISNER-GRYNBERG: If she says that under oath
23 or in a sworn affidavit, that would be further along than we
24 are here.

25 THE COURT: Okay. Anything else for this motion?

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1 MS. EISNER-GRYNBERG: Judge, I would just note if
2 the Court has any questions. The Government raised a
3 question as to the timeliness of the motion. The motion is
4 clearly timely. Federal Rule of Criminal Procedure
5 §12(b)(1) states that, At any time, a defendant may raise by
6 pretrial motion and objection that the Court can determine
7 without a trial on the merits. That's what we've done here.
8 There is no time bar or time set in that rule for when
9 motions of this type are to be filed.

10 And it's our view that this motion is most
11 efficient for the Court to decide this motion now because
12 this motion is outcome determinative to the case. This is
13 the only evidence supporting the only charge in the
14 indictment. If the Government does not have this training
15 certification document, the Government cannot make any
16 showing, let alone beyond a reasonable doubt, that
17 Ms. Salman attended military training.

18 So just like the gun in a suppression hearing for
19 a §922(g) charge. In this case, if the Court excludes the
20 document as we argue it must, the case must be dismissed.
21 So deciding that question now is the most efficient way to
22 determine the outcome of this case.

23 THE COURT: Thank you.

24 Ms. Shami.

25 MS. SHAMI: Thank you, your Honor.

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1 I actually do want to start with the question of
2 the timeliness and Ms. Eisner-Grynberg's reference to
3 Federal Rule of Criminal Procedure §12(b)(1). Had they
4 continued to read the notes for §12(b)(1), they would have
5 noted that under the 1944 Advisory Committee Notes on its
6 adoption that §12(b) motions, and there have been changes to
7 the numbering, but the thrust is that §12(b)(2) and
8 §12(b)(3) currently in the Rule, they actually identify the
9 full universe of what pretrial motions may be brought under
10 §12(b)(1).

11 It states in that note that paragraphs that
12 classify into two groups all objections and defenses to be
13 interposed by motion. In one group are defenses and
14 objections which must be raised by motion. Failure to do so
15 constitutes a waiver.

16 In the other group are defenses and objections
17 which, at the defendant's option, may be raised by motion.
18 Failure to do so, however, not constituting a waiver.
19 Nowhere in the list at (b)(2) and (b)(3) is there a listed
20 item for a motion in limine which makes it completely
21 distinct from the defendant's example of the suppression of
22 a gun in a §922(g) case. Suppression is absolutely itemized
23 in §12(b). Under §12(b)(3)(C), for suppression of evidence.
24 It is appropriate to seek the suppression of evidence
25 pretrial especially where, usually in a §922(g), there is an

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1 allegation of some kind of Fourth Amendment violation that
2 would lend itself to a legal resolution.

3 Here, what the defendant has raised, an
4 evidentiary issue that is typically brought during motion in
5 limine practice; in fact, it is titled "A Motion to Exclude
6 a Fraudulent Document." At the same time, although the
7 Government believes that the defendant has actually no
8 vehicle to bring this motion right now and there a reference
9 to §12(b) does not support this motion, the Government won't
10 object if the Court wants to resolve this issue now. And if
11 the Court wants to resolve this issue now, I think that the
12 issue that defense have raised on all of the questions about
13 what is missing or what the Government hasn't shown or why
14 the document is fake all miss the mark because they all go
15 to the veracity of the document.

16 THE COURT: Before you move on, I want to confirm
17 then you are no longer taking the position that I guess the
18 Court doesn't have the authority to have a hearing sooner
19 rather than later.

20 MS. SHAMI: Well, no. I mean, I think the
21 Government still believes that an evidentiary hearing at
22 this point would be untimely and would require the flying in
23 of witnesses and an enormous amount of work just to
24 determine what the Government believes actually is very
25 easily and straightforwardly determined based on the fact of

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1 a Second Circuit case that was issued two weeks ago that
2 actually undercuts the entirety of the defendant's argument
3 with respect to authenticity versus veracity.

4 Sorry, your Honor.

5 THE COURT: Well, I guess you didn't really answer
6 my question. If I decided I wanted an evidentiary hearing,
7 the Government is no longer objecting and saying, I need to
8 wait for a trial date to be set?

9 MS. SHAMI: No, the Government still believes that
10 an evidentiary hearing should be held closer to trial. What
11 we're seeing is that even though the Government does not
12 believe that this is an appropriate vehicle for the motion,
13 meaning, that it's just -- there is no basis for this
14 motion; it is an improper motion. The Court can just
15 dismiss it out of hand based on fact that it is improper.

16 What we're saying is it's fully briefed, if the
17 Court wants it resolved, it can. But if your Honor still
18 wants an evidentiary hearing, the Government submits that it
19 should be closer to trial.

20 THE COURT: And why is that?

21 MS. SHAMI: Because that is the typical practice
22 for evidentiary hearings. The Government would need to be
23 presenting multiple witnesses. We would be preparing for
24 multiple witnesses, bringing them into the country for
25 several of them.

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1 THE COURT: How close to trial?

2 MS. SHAMI: I think that the Government's motion,
3 opposition, noted that for the majority of them it was a
4 couple months before trial.

5 THE COURT: I looked at your examples. In a
6 number of those, the hearing was scheduled perhaps a month
7 or two before trial but then the trial date was adjourned.
8 I wouldn't adjourn a trial date, so why would I wait until
9 the last minute to have this hearing?

10 MS. SHAMI: Your Honor, it's not last minute, it's
11 just --

12 THE COURT: It's the last minute to me, sorry. A
13 month before is the last minute for me. So why would I wait
14 until then to have it and then potentially have to adjourn
15 the trial date? In three of the examples you gave me, the
16 trial date has to be adjourned; so, why would I go that
17 route instead of having it sooner rather than later?

18 MS. SHAMI: Your Honor, I think if the concern is
19 that a month does not give the Court enough time to resolve
20 the issue, certainly, you can set it sooner than one month
21 out before trial. But I think what the Government is saying
22 we don't even have a trial date set. We haven't completed
23 pretrial motions on the six other motions that the
24 Government has raised. We are still obviously briefing
25 CIPA. The defense has raised a number of discovery issues

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1 that they want us to look into. And, in fact, as the Court
2 knows, made a production last night or yesterday morning.
3 And the Government is looking into producing an additional
4 drive from NMEC. And so, at this point, we are not near a
5 trial date to be even able to work backwards from that date.

6 And so, I would submit that if you're arguing or
7 you're -- not arguing -- if you're saying that it would
8 potentially derail a trial, I understand that concern and I
9 hear you that let's look at the trial date and then work
10 backwards to what would make the Court comfortable in terms
11 of a timing for that.

12 THE COURT: Thank you. Continue.

13 MS. SHAMI: Sure.

14 With respect to all of the issues that the defense
15 has raised about the document, calling into question several
16 items about its qualities, the lack of insignia, lack of
17 stamps, lack of dates. These all go to the reliability, the
18 veracity, or the weight of the document not to its
19 admissibility and, in particular, its authenticity.

20 Authentication, of course, as the Court knows in
21 *United States versus Tropiano*, 252 F.3d 653. A
22 Second Circuit case from 2001. Authentication, of course,
23 merely renders evidence admissible leaving the issue of its
24 ultimate reliability to the jury. And although the
25 proponent of evidence has to adduce is sufficient evidence

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1 to support a finding that the proffered evidence is what
2 it's claimed to be. And then the opposing party, the
3 defense here, would be free to make all of these arguments
4 to a jury about why they should not rely on this document.

5 But the authentication, your Honor, turns entirely
6 on the fact of whether or not the Government can establish
7 and, in fact, the defendants concede that we have, that the
8 phone belonged to the defendant and that the Cellebrite
9 extraction --

10 THE COURT: Her husband.

11 MS. SHAMI: Her husband, excuse me.

12 That the Cellebrite extraction is of the phone.

13 Two weeks ago, the Second Circuit decided in
14 *United States versus Adamou*, and it will be published at an
15 F.4th, but currently, there's only a WestLaw citation and
16 that's 2025WL2025147. And on WestLaw, it's noted as
17 *United States versus Gonzalez*.

18 But in either case, the Circuit affirmed the black
19 letter law that under Rule 91 to satisfy the requirement
20 authenticating or identifying an item of evidence, the
21 proponent must produce evidence sufficient to support a
22 finding that it is what the proponent claims to be. It is
23 not a high hurdle. And here, just like in *Gonzalez*, the
24 Circuit found expressly that Rule 91 was satisfied where the
25 Government proved that the cell phones were owned by who the

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1 Government said they were owned by, there the defendants;
2 here, the defendant's husband and offered testimony from
3 analyst who interpreted the data from the Cellebrite and
4 explained the process by which it was extracted and that the
5 size of the forensic extraction of the physical cell phone
6 matched the size of the data contained in the extraction
7 report.

8 That is all that is necessary. It just shows the
9 provenance.

10 THE COURT: What type of evidence was it?

11 MS. SHAMI: A Cellebrite report just like this
12 one.

13 THE COURT: Was the document that they were
14 authenticating, is it a text message? Was it a diploma?

15 MS. SHAMI: It was text messages and I think there
16 was some other documents on the report. But I think the
17 point is that it looks to the question of the Cellebrite
18 extraction. The question here, is there any issue with the
19 Cellebrite extraction? There isn't. The defendant's
20 husband had a phone; it was seized from him upon his arrest.
21 It was taken by the SDF; it was then given to
22 Coalition Forces who then extracted it in a bit-for-bit
23 forensically sound way creating a Gold Copy. And there is
24 no suggestion, and the defendant never responded to any of
25 the items that the Government raised, noting that there is

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1 no suggestion that the document itself was doctored or there
2 was anything that happened to the forensic image and that is
3 all that is necessary.

4 Indeed, in *Musaibli* --

5 THE COURT: Let me make sure I understand because
6 I don't have case in front of me.

7 If it was extracted appropriately bit for bit or
8 whatever you said. If it was extracted appropriately, then
9 presumably the picture is authentic? Presumably, the
10 picture of the original is thus authentic?

11 MS. SHAMI: What is on the Cellebrite report is
12 authentic. Authenticity is not the same as veracity. The
13 question of whether or not the document is exactly what it
14 purports to be and is a fake or fraudulent document as the
15 defense calls it or, in the Government's view, a true
16 document that shows the defendant committed the crime of
17 receiving military-type training from ISIS is beside the
18 point.

19 The question is: Is the document itself
20 authentic? And here, is the extraction authentic? Can the
21 Court be assured that there is a chain of custody. And even
22 there, the Court was very clear that a chain of custody may
23 not be perfect. That also goes to the weight, not to the
24 admissibility.

25 Authenticity is a question of whether or not the

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1 Government can establish this document is what it is. And
2 here, what the Government is stating is that this document
3 is a photograph from the defendant's husband's phone. That
4 is what is at issue here. It is a picture that was taken
5 off of the defendant's phone. Off a phone that the
6 defendant agrees was her husband's phone. Off of a
7 Cellebrite extraction that was forensically made.

8 And, your Honor, you have a copy of the decision
9 from *Adamou*. If you don't have a copy and would like to
10 look at it or to have a copy of it if you would like.

11 But I think the other point here is that even in
12 *Musaibli*, the district court had no issue with authenticity
13 for most of the documents. The issue in the Sixth Circuit
14 was the question of hearsay. And all of the issues that the
15 defendant raises with respect to *Musaibli* that was present
16 there that is not present here, that is actually not
17 accurate. If you look through all of the exhibits and what
18 insignia, characteristics, et cetera were present in each.
19 In fact, one of the exhibits bears no insignia and the
20 witness, the live witness, Mr. Al Madioum, and I'll spell
21 that for the Court. It's A-l space M-a-d-i-o-u-m. He
22 testified as to that particular exhibit that he didn't have
23 access to that database but that it contains the types of
24 information that would typically be present which makes him
25 exactly the same as the female witness that the Government

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1 would offer. She has seen documents exactly like this. She
2 didn't say she saw the defendant's document, but as the
3 Court knows, the document is a photocopied typewritten
4 template in which a person will fill in by hand the
5 information related to the woman who took the training, her
6 husband, and his ISIS number as well as what she is
7 authorized to possess and what she's already been authorized
8 to possess. In that way, she is exactly the Government's
9 proffered witness is exactly like Al Madioum who did not
10 have -- he had not previously seen the exhibit that had no
11 insignia on it but was able to say, yes, this is the type of
12 stuff that they would typically save.

13 And I think what's really important here, your
14 Honor, is that the Circuit didn't have to reach authenticity
15 on this issue because the district court had determined that
16 authenticity was present for most of these documents. The
17 issue wasn't authenticity, it was hearsay. Authenticity
18 simply is, is this document what it claims to be? And here,
19 is this a photograph of a Cellebrite extraction taken from
20 the defendant's husband's phone and emphatically it is. The
21 defendant even concedes it.

22 Instead, what the defendant argues is, here are
23 all the reasons why I should doubt that it's reliable.
24 Those are questions for a jury. Those are precisely the
25 questions for the jury. The jury is the ultimate arbiter of

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1 the document's ultimate reliability. The defendant can
2 present all of these same arguments and say, Where is the
3 stamp?

4 The other concern that I understand that defense
5 has raised is with respect to, well, the other document the
6 Government has found hasn't been authenticated. We're not
7 at trial, the expert deadline for the Government has not
8 passed which is two months before trial. The notion the
9 Government hasn't presented expert testimony yet is frankly
10 ludicrous when the expert testimony or the expert disclosure
11 deadline is teed off of trial as should the evidentiary
12 hearing.

13 The Government has proffered, however, that it
14 will be presenting testimony from an ISIS document expert
15 and an ISIS expert. These proffers of what the Government
16 will be demonstrating at trial are sufficient at this
17 juncture for the Court to determine that the Government
18 would be able to admit this document, and frankly, the
19 entire Cellebrite extraction at trial.

20 THE COURT: I need to make sure I understand.

21 I think this argument is slightly different than
22 the argument in your briefing. But I'm understanding you to
23 say that as for the for authenticity, you only have to
24 determine that it is a likelihood that the document is a
25 document or is a picture of a document that was on

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1 Ms. Salman's husband's phone. That gets you past the
2 authenticity hurdle and then you'll have to deal with
3 hearsay.

4 MS. SHAMI: Exactly.

5 THE COURT: Okay.

6 MS. SHAMI: Would you like me to turn to hearsay
7 or would you like to me speak further?

8 THE COURT: Yes.

9 MS. SHAMI: With respect to hearsay, and just give
10 me a moment to organize myself.

11 *Musaibli* is instructive here. That is the case
12 where the district court reached the issue of hearsay, found
13 that there was no conspiracy, and the Sixth Circuit reversed
14 entirely. And the defendant in her reply argued that there
15 is a difference because there is more information provided
16 in *Musaibli* but that is not actually accurate.

17 As a practical matter, *Musaibli* does not require
18 testimony of someone with knowledge. Rather, *Musaibli*, in
19 the Sixth Circuit, indicated that the additional testimony
20 by Al Modium dispel any lingering doubts. However, the
21 Court determined that the three items that you look at to
22 determine whether or not there is a co-conspirator statement
23 were all present. Was there a conspiracy? Did it exist?
24 Second, were the declarant and the defendant part of that
25 conspiracy? And third, was the declaration by the declarant

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1 made during, and in furtherance to, the conspiracy?

2 And the Government submits that all of those
3 factors are met. The defendant erects all of these hurdles
4 and requirements that are nowhere found in any case.

5 Instead, it tries to collapse the question of authenticity
6 with the question of whether or not it's hearsay and also
7 with respect to the defense argument regarding best
8 evidence. All of it boils down to the defense's critiques
9 of whether or not the document is real but those are
10 separate questions.

11 On the first instance, is it authentic? Yes, it
12 is a document that was pulled off of an extraction off of
13 the defendant's husband's phone. And the Government can
14 show the chain of custody for that and will have testimony
15 to fill in the blanks.

16 The next question is hearsay. Yes, the conspiracy
17 that existed is a conspiracy to provide material support to
18 ISIS in the form of the defendant's service to ISIS. That
19 is why she took military training. Was the declarant and
20 the defendant part of that conspiracy? Yes. Because
21 Umm Yousef signed the document. The Government noted in its
22 brief that it is our position that she must have supervised
23 in some way the training. The Government didn't she say she
24 was the trainer.

25 THE COURT: Who is Umm Yousef?

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1 MS. SHAMI: Excuse me.

2 THE COURT: Who is Umm Yousef?

3 MS. SHAMI: Umm Yousef is the woman who signed the
4 document.

5 THE COURT: I got that. Who is she? Is that her
6 real name?

7 MS. SHAMI: That's her pseudonym.

8 THE COURT: You know who this person is?

9 MS. SHAMI: The Government does not know her true
10 identity, no.

11 THE COURT: How do you know that's not her true
12 name? How do you know that's her kunya.

13 MS. SHAMI: Umm Yousef because it follows the
14 convention for kunyas. So Umm is "the mother of" and Yousef
15 is a male name. So it could be that her first son, the
16 eldest son, is Yousef, that's typically how it's done, or
17 you can choose whatever name you want. In the case, the
18 defendant chose the name Umm Ali. She has no son named Ali.
19 She has no son Ali, she chose it because her husband was Abu
20 Ali Al Korsani Algermani.

21 THE COURT: The question is, how do we know
22 Umm Yousef is a real person?

23 MS. SHAMI: There is no question that this
24 document is, or that the picture, is of a document, right?
25 The question is, it's not whether or not -- I think

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1 one -- someone clearly wrote the document. Clearly, this is
2 a template and clearly there's handwriting on it. The
3 question of who wrote it is not dispositive or relevant to
4 the question of is the document real? The document is real,
5 it exists.

6 THE COURT: We're talking about hearsay. Do you
7 not have to demonstrate that she is in a conspiracy with
8 Umm Yousef?

9 MS. SHAMI: Yes. And to do so, you know that the
10 declarant -- it is all outlined, in fact, in the document.
11 It is completely appropriate to rely --

12 MS. EISNER-GRYNBERG: Judge, I'm sorry.

13 I'm hearing from Ms. Salman that they're frozen
14 and they can't hear the proceeding and that does appear to
15 be the case.

16 THE COURT: Okay. Give us a moment.

17 (A brief pause in the proceedings was held.)

18 THE COURT: Welcome back.

19 Ms. Shami, I was asking who Umm Yousef is and if
20 you do not need to know that this person exists to establish
21 that there is a conspiracy.

22 MS. SHAMI: The Government does not need to know
23 who she is but her real name is to establish that a
24 conspiracy existed. The document is real and that it exists
25 as a picture on a Cellebrite extraction. It didn't come --

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1 THE COURT: That is an authenticity argument. I'm
2 asking about hearsay, no?

3 MS. SHAMI: It is also a hearsay document inasmuch
4 as the defendant is saying that we have no proof that there
5 is a real person; there is a real document. The questions
6 that the defense raise collapse on each other. And it is
7 because by taking each item in the document and saying the
8 Government hasn't proven each of these elements, they
9 haven't shown who Umm Yousef is.

10 THE COURT: Let's forget -- not forget -- let's
11 move past what the defendant is saying.

12 MS. SHAMI: Sure.

13 THE COURT: I am looking at the document, it looks
14 like hearsay. You're saying there is a conspiracy. ISIS is
15 a conspiracy. Umm Yousef is part of the conspiracy because
16 this person signed this document. And somehow Ms. Salman is
17 in a conspiracy with Umm Yousef, I guess, because this
18 document is about Ms. Salman.

19 Is that your argument?

20 MS. SHAMI: Receiving training, thus materially
21 supporting ISIS or being in a conspiracy materially
22 supporting ISIS by means of her service to ISIS, yes.

23 THE COURT: But you know or you think you know
24 that based on this document. So you're using a hearsay
25 document to establish conspiracy?

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1 MS. SHAMI: Yes. And that is actually permissible
2 under Second Circuit law to use the statements themselves.
3 But there also needs to be other factors that corroborate
4 it. And here, what is corroborative is the fact that there
5 are two other documents.

6 THE COURT: Can you tell me the Second Circuit
7 case that you are referring to that says you can use hearsay
8 to establish?

9 MS. SHAMI: Sure.

10 THE COURT: If it's in your briefing, you can
11 point me to the page.

12 MS. SHAMI: Yes.

13 It's the Second Circuit *Musaibli* case that says:
14 Statements generated by ISIS' bureaucratic apparatus to
15 support the mission of providing the terrorist group with
16 personnel and services --

17 THE COURT: Slow down just a little bit.

18 MS. SHAMI: I'm so sorry.

19 Statements generated by ISIS' bureaucratic
20 apparatus to support the mission of providing the terrorist
21 group with personnel and service fit comfortably within the
22 alleged conspiracy scope.

23 Just give me one moment, your Honor.

24 THE COURT: Take your time. I think we need to
25 reconnect.

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1 MS. SHAMI: Okay.

2 THE COURT: Do we need to reconnect?

3 MS. EISNER-GRYNBERG: They can hear.

4 THE COURT: You can continue when you're ready.

5 MS. SHAMI: Your Honor, I can follow up with the
6 case. I am having a hard time finding it. It might just be
7 in my notes, something that I read as part of preparing for
8 today.

9 THE COURT: I think so. I think when I reviewed
10 your briefing you cite the rule but I didn't see any case
11 law so if you could provide that.

12 MS. SHAMI: Absolutely, your Honor.

13 THE COURT: Okay. Go ahead.

14 You were saying that there's other corroboration.

15 MS. SHAMI: Yes. And that is the existence of
16 Umm Yousef is corroborated by the additional documents that
17 were identified on the more senior ISIS fighter's hard
18 drive. In those documents, Umm Yousef signed two military
19 training documents and they bear the insignia, the ISIS
20 stamps, that the defendant put so much stock in. In fact,
21 they are with additional documents authorizing other
22 resources to the Nusaybah Katiba which means that the
23 Nusaybah Katiba also existed.

24 I want to also return to something that the
25 defendant has said in the reply and said during the last

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1 status conference that the Nusaybah Katiba was small; that
2 it was only 100 people. The defendant mischaracterizes the
3 statement of facts in Allison Fluke-Ekren's case. In the
4 statement of facts, it states that Allison Fluke-Ekren
5 herself only trained 100 people in Raqqa. It has nothing to
6 do with the full volume of women who were trained. There
7 were multiple trainers. There were multiple locations for
8 training.

9 In fact, the Government expects to provide to the
10 defendant a hard drive that contains sign-ups by over 900
11 women in an eight-month time period in Raqqa, the vast
12 majority of whom seek to learn how to use an AK-47 or a
13 suicide belt. And Raqqa is not the only location that
14 training existed.

15 The Government has witness testimony that training
16 happened in Mayadin where the defendant was -- where she got
17 married. And one of the documents, in fact, on the hard
18 drive that has an insignia stamp that the defendants have
19 noted is important to them is stamped by the Al Barrakah
20 Governorate and that encompasses a territory that includes
21 the city of Hajin where the defendant also was.

22 So the idea -- and additionally, the documents
23 also show stamps from Alfurat Governorate, which is in Iraq,
24 which demonstrates that there was training happening in
25 multiple locations. And the Government need not tell the

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1 defendant. If the Government doesn't know, the Government
2 does not know precisely where the defendant received her
3 training. The important piece is that the defendant
4 received training and the Government should be permitted to
5 make that argument to a jury by presenting the evidence from
6 the defendant's husband's phone which were retrieved via a
7 bit-for-bit Gold Copy Extraction and are thus authentic, and
8 thus show a conspiracy. And, your Honor, frankly, the
9 conspiracy could also include her husband inasmuch as the
10 defendant was seen on video being taken by her husband
11 practicing. And the fact that his name was on the training
12 document itself.

13 Certainly, the defendant has --

14 THE COURT: Was it his statement? Going back to
15 hearsay. If you're saying she was in a conspiracy with her
16 husband, even if she was, if he's not the declarant in the
17 document, does that matter?

18 MS. SHAMI: It's an additional person in the
19 conspiracy. And I think here, you know, conspiracies can
20 have hundreds, thousands of people. It depends on what the
21 conspiracy is and how it is being identified.

22 I think the Government's view here is that the
23 defendant's view of, like, rigidly identifying who is
24 Umm Yousef, and if the Government can't do that then they
25 can't prove the conspiracy. The Government, first of all,

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1 rejects that because Umm Yousef was a person, she signed
2 multiple documents including documents that were routed to
3 more senior ISIS people and stamped.

4 But apart from that, given that the defendant's
5 husband's name is also on the document, and given additional
6 documents that the defense will receive from the hard drive,
7 that indicate that the husband had to permit or OK his wife
8 taking the training, the Government could also argue that he
9 is part of the conspiracy inasmuch as he OK'd her taking the
10 training because, again, it was voluntary which actually
11 goes back to another argument that the defense made with
12 respect to compulsory training that was also --

13 THE COURT: I want to stay on hearsay.

14 MS. SHAMI: Sure.

15 THE COURT: Perhaps ISIS is a conspiracy, perhaps
16 her husband was part of ISIS and part of the conspiracy.
17 You would have perhaps a stronger argument that they were
18 co-conspirators but her husband is not the declarant. If,
19 my understanding, to get over this hearsay by the conspiracy
20 theory, you'd have to show that she's in a conspiracy with
21 the declarant which is Umm Yousef.

22 MS. SHAMI: Yes.

23 THE COURT: How do you intend to prove that the
24 statement is made, that she was in a conspiracy with
25 Umm Yousef and that the declaration was made during the

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1 course of a conspiracy?

2 MS. SHAMI: Because the document itself notes the
3 inclusion of both the defendant and Umm Yousef.

4 THE COURT: You're going to use the hearsay
5 document to prove the conspiracy to get the hearsay document
6 in?

7 MS. SHAMI: Yes.

8 THE COURT: And you're going to provide me a case
9 that tells me that you can do that?

10 MS. SHAMI: Yes, your Honor.

11 THE COURT: Okay.

12 MS. SHAMI: But, in either event, the Government
13 also submits that the residual exception would also permit
14 the admissibility of this document. And that is because it
15 was made in furtherance of the conspiracy and it meets the
16 requirements of §807 which is that it has sufficient
17 circumstantial guarantee of trustworthiness and it is more
18 probative on the point for which it is offered than any
19 other evidence that the proponent can obtain through
20 reasonable efforts.

21 Here, the evidence of the trustworthiness of the
22 military document is significant. The fact of the matter
23 is, it was taken off of a Cellebrite extraction. I've said
24 this, and I don't want to repeat myself, but it is an
25 important point. It is on her husband's phone it is in a

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1 folder called "Adari Stuff."

2 THE COURT: You told me earlier that that that
3 goes to authenticity, not veracity.

4 MS. SHAMI: It does go to authenticity.

5 THE COURT: You're saying that it also supports
6 its veracity?

7 MS. SHAMI: Hearsay is also about authenticity but
8 it's also about -- the question is, is the evidence of the
9 trustworthiness of the document. So now we're moving to the
10 question of trustworthiness and that is a question that is
11 part of §807. And so, here we're talking about
12 trustworthiness: How can the trust that this document is
13 what it purports to be? First, it was on her husband's
14 phone.

15 THE COURT: I'm sorry. Maybe I need to take a
16 closer look at this because you just said that -- let me go
17 back to my handy court reporter here.

18 So here we're talking about trustworthiness. "How
19 can you trust that this document is what it purports to be.
20 First, it was on the husband's phone."

21 MS. SHAMI: Yes.

22 THE COURT: That sounds like a straight
23 authenticity issue. I want to know how can you trust the
24 statements, how do you overcome hearsay by demonstrating
25 that the statements in this document, even if we agreed that

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1 the document -- that the picture is an accurate, authentic
2 picture of a document, of an original, how do we trust the
3 statements in the document? But you're telling me that's
4 it's trustworthy because it came from the phone.

5 MS. SHAMI: Yes, your Honor.

6 In the first instance, I use the word
7 "trustworthy" because that is what comes from the rule.
8 §807 asks whether the document being offered, or the
9 evidence being offered, has sufficient circumstantial
10 guarantees of trustworthiness. I understand how that can
11 seem alighting with the question of authenticity and they
12 are interrelated. There is a question of how can you trust
13 that this document is what it purports to be and that is the
14 question that is asked on §901.

15 So here, I mean, the analysis is pretty similar.
16 But here, focusing specifically on §807, the phones were
17 seized from her husband, a terrorist, a member of ISIS,
18 shortly before ISIS fell in Baghouz and it bears substantial
19 indicia that Abu Ali used that phone. There were multiple
20 documents on the phone that belonged to him. There were
21 multiple pictures of the defendant and her husband on the
22 phone. The document itself was located in a folder on the
23 phone that the defendant's husband had created for ISIS
24 material. It was surrounded by additional other ISIS
25 documents. When you examine the metadata of the picture

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1 itself, it was taken by the husband's phone along with
2 several other photographs taken at or around the same time
3 that he then, through the metadata analysis, you can see he
4 transferred to a folder related to all of his ISIS
5 materials. There are no additional versions of the document
6 suggesting the defendant's theory of the case which is that
7 he forged the document to be able to get more weapons which
8 is also belied by the fact that the document itself notes
9 that the weapon is already in her possession.

10 And I will also note, your Honor, that there is a
11 video of her using an AK-47, practicing. He gives her an
12 instruction. And then when she sees that he's videoing her,
13 she puts the AK-47 down near an ISIS flag and she took
14 multiple pictures of herself in front of an ISIS flag or an
15 AK-47. The ISIS flag picture she sent to her husband. She
16 made the decision to send a selfie in front of an ISIS flag
17 and send it to her husband via Share It app. These are
18 circumstantial guarantees of trustworthiness.

19 Moreover, the Government will be able to offer
20 testimony from a woman who was in ISIS territory, who was
21 present near Nusaybah Katiba's founding, near people in the
22 Katiba, saw documents exactly like this one.

23 The fact of the matter is, your Honor, it is a
24 typewritten document and you could actually -- when you look
25 at the documents themselves, you can see that they're

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1 photocopied documents. And so, there were documents being
2 created for women who were receiving training. And it's
3 because what is the document itself? It is an authorization
4 to carry a weapon. The defendant needed the authorization
5 to be able to carry that AK-47 that she is practicing with,
6 that she is seen on video practicing with.

7 And so, all of these items demonstrate that the
8 document has circumstantial indicia of trustworthiness
9 coupled with the testimony of a witness who saw this precise
10 kind of document and would be able to tell the Court and a
11 jury why this document was issued and why it's important.
12 And that's because a woman needed to have it to be able to
13 hold a weapon.

14 THE COURT: And so, everything you just said about
15 trustworthiness and why she needed the document and all
16 that. You're saying all that goes to support why we should
17 trust Umm Yousef and what she declared in that document.

18 MS. SHAMI: Yes, your Honor.

19 And, in fact, Umm Yousef appears on two documents
20 that were also stamped. The fact is that defendant puts a
21 lot of stock in the ISIS stamps. And you have two documents
22 signed by Umm Yousef that were stamped and approved and
23 routed through the governates of ISIS which further support
24 that this was a person who was signing training documents
25 for women and they were found on devices.

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1 I will note that that the fact of this particular,
2 like the photocopy itself, the template, and the filling of
3 the person's information being found on three separate
4 devices. The defendant has no supposition as to why it
5 exists on three devices. Why some of them have stamps. Why
6 they're also in connection with other documents authorizing
7 Nusaybah Katiba resources. It is because the Katiba was
8 authorized to allow women who wanted to volunteer to fight
9 for ISIS, to wear a suicide belt for ISIS, to drive for
10 ISIS, to cook for ISIS, a medium by which they can measure
11 out and exact their allegiance to ISIS. And that is what
12 the document shows, and it shows that multiple women wanted
13 that opportunity and that the defendant was among them.

14 I think your Honor asked questions of the
15 defendant about the Best Evidence Rule. And here, I think
16 the Government believes it made out its arguments in the
17 brief. But I do want to just say that the notion that the
18 Government has to provide the original of a photographic
19 rendering of a document would basically eviscerate the Best
20 Evidence Rule. It exists for situations like this where the
21 original is not in the Government's possession.

22 The Government has tried to find this original
23 document. Of course, the Government would much prefer to
24 provide an original document at trial. But the Government
25 cannot find it in its electronic repositories. And in so

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1 far as ISIS might still have the original or it might have
2 been destroyed, the fact of the matter is that lots of the
3 cities that were besieged by the SDF, by the Syrian Arab
4 Army, by Coalition Forces, there was lots of damage. The
5 Government does not have the document and the idea that the
6 Government can't present the next best thing, which is an
7 exact picture of the document, would basically render the
8 Best Evidence Rule a dead letter.

9 THE COURT: What do you have to present to
10 demonstrate that you made efforts to obtain the original?

11 MS. SHAMI: So, your Honor, all there is really
12 necessary is testimony that, or an affidavit, that the
13 Government has tried to do so, and the Government can do
14 that. If the Court needs an affidavit from the Government.

15 THE COURT: Does the affidavit have to include the
16 steps that you took to locate it? I mean, because from what
17 I'm hearing right now, I'm assuming that it's no longer
18 available because it's in Syria or in ISIS-controlled area,
19 so it seems like we're assuming.

20 Do you have to show that there is some additional
21 steps taken?

22 MS. SHAMI: Your Honor, I don't know if there are
23 specific steps that need to be itemized or whether or not
24 it's just simply a statement that the Government made its
25 best efforts. I can get back to you in a letter, or the

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1 Government can get back to you on that in a letter as to
2 what the affidavit might contain.

3 THE COURT: Why don't you send me the affidavit.
4 And in the affidavit, when you say you made your best
5 efforts, you can tell me what those best efforts include
6 generally. And if I want more detail, I will let you know.

7 MS. SHAMI: Okay.

8 THE COURT: Because, like as I stated, I
9 understand where the original is presumably located. And
10 so, I'm wondering if we're just presuming that it doesn't
11 exist which may be satisfactory, which, given where it's
12 located, but I want to know the full universe of your best
13 efforts before I decide.

14 MS. SHAMI: Yes, your Honor.

15 THE COURT: Thank you.

16 MS. SHAMI: And then I think the final issue that
17 the Government opposed in its opposition relates to the
18 probative value of the document.

19 And here, I think it's interesting that the
20 defense has raised the question of, well, it's just like a
21 fake drivers license, and a fake drivers license is not
22 probative compared against eight other fake drivers
23 licenses, but a fake document can be probative.

24 The Government believes this document is real and
25 it is genuine and it represents the fact that the defendant

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1 received military-type training. But a fake drivers license
2 in the possession of a person who is charged with aggravated
3 identity theft is probative. It is probative of the crime.
4 It is probative of the mens rea of the defendant charged
5 with aggravated identity theft. The fact that there is a
6 document on her husband's phone authorizing her to carry a
7 weapon coupled with the video of her carrying a weapon is
8 probative. The Government believes that it's genuine and
9 will submit testimony and evidence that it is genuine. But
10 the question of the probative value of it, it is clearly
11 probative to the charged crime and the Government is
12 entitled to present that evidence. And the Second Circuit's
13 reversal in *Garnes* made it very clear in affirming that the
14 Government has to be permitted to present evidence of the
15 res gestae of the crime charged and that is what this
16 document does.

17 Also, I want to just conclude on one point and I'm
18 happy to answer any questions.

19 But the defendant has said multiple times now that
20 the admissibility of this document is case dispositive
21 suggesting that the Government would dismiss the case if the
22 Court ruled it inadmissible. I don't know how the defense
23 would presuppose to know what the Government's other avenues
24 would be in the event of an adverse ruling but I just wanted
25 to say that the Government believes the defendant committed

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1 this crime and will continue to prosecute this case.

2 THE COURT: Thank you.

3 MS. EISNER-GRYNBERG: May I respond to the
4 Government's argument?

5 THE COURT: Quickly.

6 MS. EISNER-GRYNBERG: First of all, what the
7 Government has stated that what *Adamou* stands for is
8 fundamentally incorrect.

9 THE COURT: Remind me of which one -- *Adamou*
10 stands for?

11 MS. EISNER-GRYNBERG: This case where the
12 Government says, as a profound premise, that if items are
13 pulled off a Cellebrite report they are admissible.

14 THE COURT: That's not admissible truly.

15 MS. EISNER-GRYNBERG: That's obviously not true.

16 The rules of evidence apply to each piece of
17 evidence and their contents that are put before a Court.
18 It's clearly not the case that so long as any piece of
19 evidence is photographed on a phone and then pulled off the
20 phone by a Cellebrite that the authentication question is
21 cured. That's not a rule of evidence and that's because
22 evidence is only admissible in terms of what it is being
23 offered to prove. Here, the Government is offering to prove
24 this training document to prove the truth of the matter
25 asserted therein, that Ms. Salman did receive training. The

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1 fact that --

2 THE COURT: Ms. Shami, I think, she's trying to
3 chop up the argument a little bit, right? She's saying this
4 is a picture that was on her husband's phone and that she
5 proves that, or she tries to prove that, and then she moves
6 on to hearsay. You're saying she can't chop it up that way.

7 MS. EISNER-GRYNBERG: Yes. The fact that it is
8 authentically taken from the phone doesn't do anything to
9 tell us whether the contents are authentic and that's the
10 part that matters. Imagine this. Imagine right now I print
11 out the exact template of the training document in this
12 case. I fill it out with all of the exact same information
13 that is in our case. And then on the signature, my oldest
14 son's name is Brent, B-r-e-n-t, I sign "Umm Brent," I take a
15 picture of it with my phone and I send it to the FBI. The
16 FBI plugs Cellebrite into it and pulls it out. There is no
17 question that it is a photograph of the document that I
18 created. But there is also no question that it is an
19 inauthentic document. I, Umm Brent, are not a person who
20 can make a document certifying Umm Katab or Umm Ali to
21 receive an AK-47.

22 THE COURT: But isn't it an authentic document,
23 there is just no veracity to it.

24 MS. EISNER-GRYNBERG: No, it's not an authentic
25 document for the purposes that it will be offered in a trial

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1 against Halima Salman, it's fake. The document is not what
2 it purports to be. It purports to be a graduation
3 certificate from training. That's what it's being offered
4 for. And I, Mia, "Umm Brent," am not authorized make that
5 kind of document. So it can't reach even the low threshold
6 of authenticity. And it also then would not meet the
7 threshold for a co-conspirator statement because "Umm Brent"
8 is not or never was in a conspiracy with Halima Salman. We
9 know that to be true.

10 Your Honor asked the Government, who is
11 Umm Yousef? How do we know that she is a real person? And
12 the Government has no answer to that question. So they
13 can't prove that the defendant was written by a person that
14 they don't know to even exist, it's entirely circular.

15 THE COURT: I think she says that Umm Yousef has
16 signed other documents that had the insignia.

17 MS. EISNER-GRYNBERG: Right. That also doesn't
18 make this document any more likely to be true.

19 THE COURT: Are you saying Umm Yousef is a real
20 person?

21 MS. EISNER-GRYNBERG: Who knows? It might be a
22 fictitious person who people in this area sign the document
23 as. Or she might have been a real person, which the
24 Government has not established, who signed the other
25 documents and then not Umm Yousef signed this one.

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1 Let's go back to my example. I, Mia
2 Eisner-Grynberg, see a document signed by Umm Yousef. I
3 say, okay, now I know when I make my fake document,
4 Umm Yousef is one of the people authorized to sign. So I
5 write Umm Yousef or I trace Umm Yousef. My document is not
6 true, it's both inauthentic and it's still hearsay because
7 the declarant in the case is not actually Umm Yousef. The
8 declarant is me. Just because I write "Umm Yousef" on it
9 doesn't prove that Umm Yousef, an actual person if she is
10 one, was actually the declarant. And the Government is
11 offering no evidence, zero, that Umm Yousef is actually the
12 declarant of this document.

13 The Government is saying that this document was
14 made by a person that they don't know who it is. They don't
15 know if she is real. They just said they don't know where
16 it was made. They said they don't know where it was made.
17 But the Court can trust it because it was found on a phone.
18 That eviscerates both authenticity and hearsay. The
19 document is made, as the Court pointed out, by a declarant.
20 The declarant is proffered to be Umm Yousef. Umm Yousef is
21 proffered to be, we don't know. If instead of Umm Yousef it
22 said "Jane Doe," we would be in exactly the same position.
23 We have no idea who this person is even if this is a person.

24 If, for example, Ms. Salman's -- somebody in
25 Ms. Salman's life made this document and that person then

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1 was the true declarant and they signed "Umm Yousef," we
2 would be in exactly the same position that we are here. And
3 that person would not have been in a position to speak on
4 her behalf to certify the truth of the matter asserted.

5 The idea that we should turn to §807 is frankly
6 absurd. §807 is to be used only in the most trustworthy
7 circumstances. That's what the Second Circuit said in
8 *Parsons versus Honeywell* that the Residual Exception would
9 be very rarely used only in exceptional circumstances.
10 Those are where the authenticity is least in question where
11 we're certain that the document is real and there's just a
12 question about the truth declared by this declarant. That's
13 the opposite of the situation that we're in here.

14 When we have myriad questions about whether the
15 document is real and the defendant concedes they have no
16 idea who wrote it, and if the person who wrote it is even a
17 real person, that would be the last place we would use the
18 Residual Exception rather than here.

19 Just to last point out. The Government has just
20 stated that they have corroborating evidence for 900 other
21 women who signed a sign-up sheet to attend this training.
22 Notably absent from that is Ms. Salman. When we said we
23 think there should be a sign-up sheet or a roster, that was
24 our supposition based what we've seen in other cases.

25 Now, the Government now tells us that that's true

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1 and she is not on here. So, again, that's yet another
2 reason to doubt the authenticity of this document.

3 MS. SHAMI: Your Honor, I would like to respond to
4 a couple of these points. I also found a case that said
5 that you can rely on the hearsay statements themselves. So
6 at least I have that. I would like to provide to your
7 Honor.

8 There is a Supreme Court case *Bourjaily versus*
9 *United States*, 483 U.S. 171. In making a preliminary
10 factual determination of these elements, the Court may
11 consider the hearsay statements themselves; however, they
12 are unreliable. For such statements to be admissible, there
13 must be some independent corroborating evidence of the
14 defendant's participation. And the Government submits that
15 there is.

16 Regarding the quote, sign-up sheet, I don't
17 believe that I characterized it as a sign-up sheet. I
18 characterized that there is evidence on a drive that will
19 show that over 900 women sought to sign up and that I
20 cabined the specific time and also I believe, and if I
21 haven't, I'll cabin it in right now. These are sign-ups in
22 Raqqa. The defendant has indicated that she was not in
23 Raqqa. So the fact that her name is not going to be on it
24 is not dispositive of anything. It is dispositive of the
25 fact that she was not in Raqqa. So it's not a fake document

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1 showing that she's on a list that she otherwise couldn't be
2 on because she was not in that location.

3 And to return to the defendant's example of if she
4 created a document on her own phone and signed it. Your
5 Honor is absolutely right, it would be an authentic document
6 on her phone. But there is no corroboration for a Mia
7 Eisner-Grynberg to sign her son's name on a document and
8 purport it to be a training document. However, a woman who
9 traveled to ISIS territory with her parents. Who turned 18.
10 Who married an ISIS fighter. Who went to live with the ISIS
11 fighter. Who took up arms and practiced on an AK-47. Took
12 pictures of herself with ISIS. Who socialized with ISIS
13 supporters. Who also, while in the camps, continued to
14 socialize with ISIS supporters and demonstrate her own
15 support of ISIS by, and I'll reference here the chat that
16 the Government referenced in its defense, excuse me, not the
17 defense, the detention arguments that have thus subsequently
18 been produced to the defendant showing that she joined a
19 chat, or was added to a chat, that had extremist content.
20 The defendant was in ISIS territory, married to an ISIS
21 terrorist; the daughter of an ISIS terrorist; taking
22 pictures in front an ISIS flag; practicing with an AK-47;
23 arrested two days before Baghouz fell where only the
24 die-hard ISIS supporters and fighters were.

25 There is sufficient corroborating evidence to

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1 demonstrate that the document found on her husband's phone
2 is authentic. Unlike a Mia Eisner-Grynberg document that is
3 on her phone sitting in Brooklyn being offered to the FBI
4 for reasons unknown.

5 Thank you, your Honor.

6 MS. EISNER-GRYNBERG: I'll clarify. I'm not
7 Halima Salman. In my example, I'm Umm Yousef. I cannot
8 certify that Halima Salman went to my training because there
9 was no training held by me. And I'm not an appropriate
10 person to be making that declaration. Just the same a
11 Umm Yousef who the Government concedes may not even be a
12 real person.

13 THE COURT: Thank you. That clarified a lot.
14 Maybe.

15 Let's move on to ECF 76, the NMEC database.

16 Mr. Price, if you want to make any additional
17 arguments in addition to your briefing and then I think I
18 may have a few questions for you.

19 MR. PRICE: Yes, your Honor. Good morning.

20 With respect to the NMEC motion here, the Court
21 needs to answer two questions:

22 First, was querying NMEC a separate Fourth
23 Amendment search?

24 And second, were those queries reasonable?

25 We are not, right now, at a point where we can

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1 actually have that argument. We do not know what queries
2 the Government ran.

3 We don't know --

4 THE COURT: I'm sorry to cut you off. Let me ask
5 you preliminarily.

6 I believe the parties are conferring about some
7 discovery issues in defendant's motion to compel. Should I
8 be holding this motion in abeyance pending that motion to
9 compel and whether some of the issues are going to be
10 resolved?

11 MR. PRICE: Yes, your Honor.

12 So, as background, the defense has narrowed our
13 discovery requests with respect to NMEC. We sent those to
14 the Government. We are waiting for a response from the
15 Government to those more narrow requests. We have not yet
16 received one except that we are scheduled to have a meet and
17 confer tomorrow afternoon.

18 The issues there, as we spoke about the last time,
19 relate to the database itself. You know, which database was
20 searched? What's in it? What were the parameters of that
21 search? That goes to the first question that the Court has
22 to answer.

23 Was this database so big and different from
24 searching, say, just a single cell phone that searching it
25 amounts to a Fourth Amendment event. So we need additional

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1 information from the Government about the database itself to
2 answer the first question. The second question, assuming
3 that the Court finds.

4 THE COURT: Sorry. To put a finer point on it.

5 So you don't think that whatever the Government
6 comes back with tomorrow, you don't think that's going to
7 resolve the motion then?

8 MR. PRICE: I don't think, whatever the Government
9 comes back with, it will not resolve the substantive motion.
10 We will then presumably argue about whether the facts that
11 they disclosed meet the standard or not.

12 THE COURT: I see. Okay.

13 So first you need to know whether this database is
14 a dragnet?

15 MR. PRICE: So that is question number one. We
16 have a little bit of that information from the *Musaibli*
17 case. We know, for example, that the NMEC database is 66
18 times the size of the §702 database in *Hasbajrami*. We know
19 that it contains more and different sensitive types of
20 information than just the e-mails in the §702 database.

21 I think based on that, this court could conclude
22 that querying was a Fourth Amendment event. The next
23 question is whether those queries were reasonable because
24 they were, of course, done without a warrant. The
25 reasonableness, the Fourth Amendment standard, kicks in at

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1 that point. And, as in *Hasbajrami*, as the Second Circuit
2 remanded back to Judge DeArcy Hall to determine, it is
3 necessary to examine those queries themselves to know what
4 they are in order to determine whether they were, in fact,
5 reasonable. We don't know what the queries were in this
6 case, we are asking for that information. We would also
7 like to know what was returned in response to those queries.
8 We do not have that information either.

9 THE COURT: Would you agree that if the queries --
10 and we're going to obviously ask the Government questions as
11 well -- but would you agree that the queries targeting
12 another person? I seem to remember the Government saying
13 that it wasn't Ms. Salman's name at least, I have questions
14 if it was other searches that perhaps were related to her.
15 But do you agree that the queries were targeting another
16 person and were not Ms. Salman's name related to Ms. Salman,
17 those queries would not violate the Fourth Amendment?

18 MR. PRICE: No, your Honor.

19 THE COURT: Okay.

20 MR. PRICE: So, even in *Hasbajrami*, some of the
21 queries were not for Mr. Hasbajrami.

22 THE COURT: How do you know that?

23 MR. PRICE: In the Second Circuit opinion and in
24 the E.D.N.Y. opinion.

25 THE COURT: I thought in Judge Dearcy Hall's

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1 opinion, she redacted the queries. Was there something else
2 in there that which you know what the queries were?

3 MR. PRICE: It does state that the supplemental
4 record consists of -- sorry.

5 Nonetheless, because redacted use terms associated
6 with defendant in databases containing Section 702 acquired
7 information, these queries are subject to the Court's
8 foreign intelligence exception analysis.

9 THE COURT: Can you give me a pincite?

10 MR. PRICE: I can in a moment.

11 It's going to be in the E.D.N.Y. 2025 opinion; so,
12 at Page 11. So that's WestLaw, 2025 WestLaw 447498 at Star
13 11. It describes the queries that were Remen Hasbajrami
14 with a lot of redactions; however, it does become clear that
15 they were searching for terms other than Mr. Hasbajrami's
16 name. And the Court finds that those queries are still
17 subject to its Fourth Amendment analysis because they
18 concern Mr. Hasbajrami; they were about Mr. Hasbajrami.

19 THE COURT: That was included in my question. I
20 said, I think my question was, would you agree that the
21 queries were targeting another person. So they were not
22 Ms. Salman's name or related to Ms. Salman then those
23 queries would not violate the Fourth Amendment. So here it
24 seems like they were related to Mr. Hasbajrami if they were
25 not related to him or to Ms. Salman do we not have a Fourth

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1 Amendment issue.

2 MR. PRICE: The queries need to be related to
3 Ms. Salman involved in the investigation of her sure.

4 THE COURT: What does that mean? This may be --
5 what does that mean to be related to?

6 MR. PRICE: I'm speculating here because I don't
7 know what queries they ran. But if they ran queries for her
8 family members seeking information about her, that would be
9 about Ms. Salman.

10 THE COURT: So if they searched her husband's name
11 or they searched her father's name?

12 MR. PRICE: Correct.

13 THE COURT: You would say that that's related to
14 Ms. Salman.

15 MR. PRICE: Yes.

16 THE COURT: Okay.

17 MR. PRICE: Again, we are speculating about what
18 those queries were at that point. We don't actually know
19 what the Government was searching for. But, yes, the
20 question then that the Court will ultimately have to answer
21 is: Were those warrantless queries of this database
22 reasonable?

23 And *Hasbajrami*, Judge DeArcy Hall found that
24 reasonableness in this context means get a warrant. That
25 the Government had every opportunity in the many years that

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1 transpired between the collection and the use to obtain a
2 warrant. Here, that was four years.

3 The initial collection of these phones was in
4 2019. The Government says that it ran its first NMEC search
5 some time in the second half of 2023. It is, I think,
6 entirely reasonable, as Judge Dearcy Hall found, to require
7 the Government to get a warrant at some point in those four
8 years. Especially -- this is not information that was being
9 intercepted in real-time and acted upon. It was data that
10 was seized, put into a massive database where it sat for
11 four years until the Government went on its fishing
12 expedition. This is an, in our understanding of this, a
13 warrantless search of data from and about Ms. Salman through
14 that query.

15 THE COURT: Can I confirm?

16 So I understand you to be saying, given the size
17 of the database, and assuming for now that the queries were
18 Ms. Salman's name or related to Ms. Salman that that's the
19 Fourth Amendment violation. And I want to confirm that you
20 take this position even if Ms. Salman was in Syria at the
21 time of the search. I believe in *Hasbajrami*, he was in the
22 United States in another, I think, perhaps, who knows,
23 important difference is that the information that was seized
24 and funneled into the database was also seized in the
25 United States where this information, as I understand it,

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1 was seized internationally and then perhaps housed
2 domestically. So is this query of the database of the
3 search would that be a domestic search or a foreign search.

4 Yes, so that's my...

5 MR. PRICE: It's our opinion here it's the query
6 that counts. And the query here was done, I believe, in
7 Maryland. That's where NMEC is located. But the Fourth
8 Amendment event happened here in the U.S., in Maryland and
9 not abroad.

10 THE COURT: So you would say it's a domestic
11 search even if the information was gathered overseas and, I
12 guess, it's housed in servers in Maryland perhaps.

13 MR. PRICE: We're not contesting the
14 constitutionality of the initial collection.

15 THE COURT: I agree. I understand that.

16 I think I still need to determine whether it's a
17 domestic search or a foreign search. And I'm not sure from
18 *Hasbajrami* that it matters just where NMEC is located. If
19 it's your argument that all that matters is where NMEC is
20 located, okay, but I'm not sure from *Hasbajrami*.

21 MR. PRICE: It matters where and when the search
22 occurred. And it was a domestic law enforcement query done
23 in the United States targeting a U.S. citizen.

24 THE COURT: Does it matter if a U.S. citizen
25 wasn't in the U.S.?

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1 MR. PRICE: I do not believe it matters to the
2 analysis.

3 THE COURT: Okay.

4 MR. PRICE: I would also add, your Honor, as far
5 as the timing goes here that one of the things that the
6 Second Circuit was concerned about in *Hasbajrami* was the
7 Government going back and conducting a fishing expedition
8 across this massive database here. They draw a distinction
9 and they say, you know, we would treat this differently. If
10 it was, say, happening in real-time, if there were
11 interceptions, if information was being passed back to the
12 FBI for purposes of investigation. But here we know that
13 that was not the case. The marriage certificate was
14 obtained by the Government in 2019. They did not have any
15 derogatory information about Ms. Salman by their own
16 admission until February of 2021. That was disclosed, I
17 think, yesterday in the Government's production.

18 So what we're dealing with here is not some sort
19 of continuing ongoing investigation, there was a -- there
20 was a collection. There was no supposition that Ms. Salman
21 was engaged in ISIS-related activity at that time. It
22 wasn't until years later that the Government went back,
23 queried this database for her and for information about her,
24 that they obtained this derogatory information.

25 So that, I think, puts us squarely in the fishing

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1 expedition category as opposed to, say, the police officer
2 going back to check the evidence locker. That's the
3 distinction that the Court is trying to make in *Hasbajrami*
4 when deciding whether a query of the database is a Fourth
5 Amendment search saying, is it more like an officer going
6 back to the evidence locker to check one piece of evidence
7 that they've already seized? Or is digital different,
8 right, combining, you know, hundreds of thousands of devices
9 in a database that is known to collect information about
10 U.S. citizens. Is that different than just going back to
11 the evidence locker to check?

12 We submit that it is here in the same way that
13 searching the §702 database later on for domestic law
14 enforcement purposes is its own Fourth Amendment event. I
15 do believe that we need to have additional information from
16 the Government about the queries that they ran. Whether
17 that is a record of the searches that they performed and the
18 results. Or, as in *Hasbajrami*, declarations from the
19 Government about what searches they ran and what those
20 results were. Or we can have live testimony from anybody
21 who ran those searches? But we're going to need to know
22 what those searches were in order to assess their
23 reasonableness.

24 THE COURT: Thank you.

25 Ms. Shami.

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1 MS. SHAMI: Yes, your Honor.

2 So I think the fundamental flaw in the defendant's
3 argument is this superimposition of *Hasbajrami* on to Fourth
4 Amendment law and trying to supplant black letter Fourth
5 Amendment law in place of a statutory framework that has its
6 own definition of a breached person. That has its own
7 minimization requirements. That has its own requirements
8 for what the FBI must do to be able to query. And that by
9 Judge DeArcy Hall's own recognition has changed since the
10 time of *Hasbajrami* making the Court's decision completely
11 siloed to only the facts of that case where she declined to
12 reach any other case or to indicate any applicability.

13 I think, as a baseline, the defense seems to be
14 that if there is a database, and there is a search of it,
15 then that is a Fourth Amendment event and that is not the
16 case.

17 THE COURT: I don't think that's what he's saying.

18 MS. SHAMI: It is essentially the case because, in
19 the first instance, the Government argues here based on the
20 collection that the search took place abroad. The search is
21 the extraction of the phone that took place in Iraq. There
22 is no question that the extraction took place in Iraq and
23 the extraction is the search. The extraction is what takes
24 the information off of the phone and then it is provided to
25 NMEC to put into a database. That is no different than an

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1 individual who is picked up by the police and then has
2 information put into the N.Y.P.D. database and that N.Y.P.D.
3 database can be searched later on, has this person been
4 arrested before? That information was already provided, it
5 goes into the database. It is like a DNA database in the
6 same way. That database can always be queried because the
7 information in it was seized through lawful means.

8 Here, it was seized lawfully because -- for so
9 many reasons. The first is that it was seized abroad from a
10 non-U.S. citizen. And even if he was a U.S. citizen, the
11 Fourth Amendment not apply extraterritorially whether it's a
12 U.S. citizen or a non-U.S. citizen. The SDF, a separate
13 foreign entity, seized the phone from the defendant's
14 husband and then provided it to the United States and
15 Coalition Forces who then, overseas in Iraq, extracted it,
16 conducted the search in Iraq, and then provided that to
17 NMEC.

18 So, in any way that you frame it, the subsequent
19 querying is similar to going back to the evidence locker
20 because the evidence was provided to NMEC by a foreign
21 nation via Coalition Forces.

22 THE COURT: I'm wondering if we're miss -- you're
23 saying that extracting the information is a search?

24 MS. SHAMI: Yes, your Honor.

25 THE COURT: What is the definition of a search?

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1 MS. SHAMI: Well, the search here is, like, the
2 search and seizure of the phone. So the seizure of the
3 phone is when it was physically seized from Abu Ali's
4 person.

5 THE COURT: Yes.

6 MS. SHAMI: The search is the extraction of the
7 phone. Taking the information from the phone and being able
8 to then search it because, right, the Government did search
9 the phone. DoD did search the phone and then provided it to
10 the Intelligence Community.

11 And actually I think --

12 THE COURT: What does that mean "the DoD searched
13 phone"? Just that they extracted it, or did somebody
14 actually look at it? Yes?

15 MS. SHAMI: Yes. So, again, the purpose of why
16 DoD collects devices abroad, as outlined in the Government's
17 brief, is to be able to mine it for intelligence
18 information. It is critical when you are conducting a
19 military operation against a terrorist organization to be
20 able to get intelligence from what you are seizing.

21 And so, that is why in 2019, the FBI received
22 information about the marriage certificate because there was
23 an ongoing mining of the information seized abroad and being
24 conducted and searched abroad. But the extraction itself is
25 the full search being provided to NMEC so that it can also

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1 be used by law enforcement which is consistent with the
2 statutory language related to DoD providing to law
3 enforcement information evidence seized abroad.

4 THE COURT: So the entire phone isn't extracted
5 and then going to NMEC. It's extracted, it's evaluated, and
6 then what they deem important is put into NMEC?

7 MS. SHAMI: No, the full phone. It has to be
8 bit-for-bit Gold Copy Extraction. That way it's
9 forensically sound.

10 THE COURT: How is that a search rather than just
11 an extraction and you're storing it in a database at NMEC?

12 MS. SHAMI: Your Honor, extraction is the search.
13 When the Government extracts information from a phone, that
14 is part of when we get a search warrant, we have to do that,
15 right? If we have a phone in our possession, we cannot
16 simply extract it. Part of the extraction is covered by the
17 search warrant. And then the seizure, what we're searching
18 for specifically, is what we are ultimately are authorized
19 to search for and seize. But the extraction itself can't
20 happen without authorization. But in the circumstance
21 here --

22 THE COURT: In *Hasbajrami*, the Second Circuit says
23 there is an additional Fourth Amendment event when you query
24 what was seized. So why is that not a query? Or why is
25 that query not a search?

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1 MS. SHAMI: Yes, your Honor.

2 It's because the way that *Hasbajrami* collected the
3 information is far different. Your Honor hit it on the head
4 when you indicated this is partially a domestic collection.
5 The collection that is described in *Hasbajrami* is quite
6 specific as to what's happening. It is very different than
7 the seizure of physical evidence: The phone, the device,
8 the laptop. And the extraction of the information abroad.
9 It is not real-time, as the Second Circuit provided,
10 real-time collection of communications which is what I think
11 the Second Circuit had made that dividing line that this
12 §702, in their understanding, accomplishes this particular
13 outcome.

14 Whereas, we're talking about devices. Devices
15 have nothing to do with *Hasbajrami*; it has nothing to do
16 with §702. It has nothing to do with FISA. The imposition
17 of that statutory framework on a device is inapposite. The
18 Court should be applying the Fourth Amendment precedents
19 which is that if you do not have standing, and the defendant
20 doesn't have standing, it was not her phone. She did not
21 assert it vicariously. The phone belonged to her husband.

22 I think it's also important to note how the
23 information about the defendant's criminality came to light
24 because the defendant characterizes it as a fishing
25 expedition. But the Government's brief shows how

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1 information basically trickled in. They received the
2 marriage certificate. They then saw the Kem photo book that
3 showed her with pictures of her with an ISIS flag, with an
4 AK-47. They then requested the Gold Copy. They saw --
5 there were documents they could not understand because they
6 were either in Arabic or German and sent them for
7 translation.

8 And then subsequently, they received a translation
9 as part of another search that did not name the defendant.
10 And they were able to see, in fact, the defendant received
11 military-type training from ISIS. It was not a fishing
12 expedition to find crime by her. It was the fact that
13 evidence existed on a device that was extracted lawfully
14 abroad of a device that was seized by a foreign partner, and
15 by "foreign partner," I mean a foreign military partner and
16 nothing to do with any kind of agency which is one of the
17 factors that the Government notes in its brief would be
18 relevant but is not present here because the SDF is a
19 separate entity from U.S. law enforcement. U.S. law
20 enforcement did not direct SDF to do anything. And apart
21 from that, then was able to look at the information.

22 But I'll also note what the Government noted in
23 its brief which is that the Fourth Amendment doesn't require
24 a warrant in every single instance. Reasonableness is the
25 touchstone of the Fourth Amendment. There are a number of

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1 instances where a search is permitted without a warrant.

2 As the Government notes in its brief, stops under
3 *Terry*, they are Fourth Amendment events but those events do
4 not require a warrant. A border search does not require a
5 warrant. The touchstone is reasonableness. And here, it
6 was reasonable for the Government to search a database that
7 contains extractions. The search results received from
8 abroad of a non-U.S. or even a U.S. citizen, but the
9 defendant was not -- was not her phone and to search that
10 information. And even if the Court determines that it was
11 not appropriate, the good-faith exception would still
12 capture all of this because the Government has been
13 searching NMEC. Evidence from NMEC has been submitted and
14 admitted, or presented to be admitted, at trial and it has
15 been found to be admissible.

16 So there was nothing that would put the FBI on
17 notice that there was some kind of inappropriateness to the
18 search. But, as a fundamental matter, the Government
19 believes that both because the defendant did not own the
20 phone, she was abroad, it was her husband's phone, and
21 because it was seized by a foreign entity, that the Fourth
22 Amendment framework that's applicable to all of those
23 scenarios would find that there was no search here that
24 required a warrant.

25 The only way that the defendant gets to the point

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1 of a warrant is by superimposing FISA and §702 on to the
2 Fourth Amendment. And that's just not appropriate here
3 because the definition of "aggrieved person" in FISA is far
4 different than how the Fourth Amendment defines it.

5 If you have any questions, I'm happy to answer
6 them but that is my response to the defendant's arguments
7 here.

8 THE COURT: I do have questions. Just a moment.

9 Mr. Price, I am still not clear. Well, you just
10 said because the definition of an aggrieved person is
11 different. But I am still -- the distinction you are trying
12 to make between what happened here and what happened in
13 *Hasbajrami* is not clicking for me. They said that the
14 database was a dragnet. They got redacted versions of what
15 the queries were to determine. Judge DeArcy Hall redacted
16 versions of the queries to determine whether the Fourth
17 Amendment applied to the search, meaning, to me, that the
18 search was using those queries of the database which was a
19 dragnet to search for information concerning Mr. Hasbajrami
20 or whatever was searched.

21 That is what I understood *Hasbajrami* to be saying.
22 But now I think you're saying that we don't look at
23 *Hasbajrami*, we just look at the Fourth Amendment because the
24 definition of an aggrieved person is different. But that's
25 based on Ms. Salman being in Syria. Based on the search or

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1 the extraction happening overseas. But it seems in
2 *Hasbajrami* they're saying that it is the collection of data
3 which constitutes a dragnet that is important. I don't know
4 that it says where the collection happened. That's why I
5 was asking the defendant, defense counsel, as well. Does it
6 matter where the extraction happened or does it matter where
7 it's stored? What matters here?

8 MS. SHAMI: I think that it does matter, your
9 Honor. I think domestic law acknowledges that there is a
10 differential perspective when you're talking about
11 prospectively seized information whether it's a Title III
12 wiretap or a FISA or a §702 versus something that exists on
13 a device that the Government has or, here, in this instance,
14 the SDF has seized and has turned over to the Government.
15 These are very specifically different circumstances. And
16 the defendant only is able to get to the point of querying
17 is a problem by first stating that the database itself
18 matches on to what was at issue in *Hasbajrami* but that's
19 just not applicable.

20 The database in *Hasbajrami* is different than the
21 NMEC database. The NMEC database contains information
22 captured abroad and the Supreme Court and the Second Circuit
23 are very clear that evidence abroad is treated differently,
24 it just is. It is different than domestic collection. And
25 apart from that...

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1 THE COURT: So it doesn't matter if the database
2 is a dragnet. If all the information that's in it is
3 abroad, then you can search whatever you want to search?

4 MS. SHAMI: Your Honor, it's not that it's all
5 abroad. It's the question of how it was seized. The
6 Second Circuit and the Supreme Court have noted that if the
7 seizure happens abroad, and it's done by a foreign entity,
8 and then given over to the United States, that does not
9 violate the Fourth Amendment because the Fourth Amendment is
10 not extraterritorial.

11 THE COURT: So if you -- if it's seized by a
12 foreign entity, given to the United States, and it's stored
13 in a dragnet database then you can search whatever you want
14 to search?

15 MS. SHAMI: Yes, your Honor.

16 THE COURT: Okay.

17 MS. SHAMI: I obviously wouldn't call it a dragnet
18 database.

19 THE COURT: You're saying it doesn't matter how
20 much information is in there as long as it's extracted by a
21 foreign entity and given to the United States.

22 MS. SHAMI: Here, it was seized by a foreign
23 entity and extracted by Coalition Forces in Iraq. But, yes,
24 effectively everything that happened with respect to the
25 search happened abroad. The seizure, the extraction, all of

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1 that happened abroad and then it was turned over to the
2 United States.

3 THE COURT: That's what makes it okay to search
4 it?

5 MS. SHAMI: Yes.

6 THE COURT: Okay.

7 MS. SHAMI: Your Honor, I think here in *Hasbajrami*
8 I want to add the point that this dealt, *Hasbajrami* dealt
9 with a highly sensitive and classified set of information.
10 That is not what's happening here. There is some
11 transparency as to -- the Government has turned over at this
12 point four devices, soon five devices, of information that
13 was seized. It's because it was seized, we have the
14 extractions, we're able to search it. The defendant has the
15 ability to search those devices just as well as the
16 Government does because they have the full Gold Copies.

17 The sensitivity around *Hasbajrami* does not affect
18 the Fourth Amendment interests that the Supreme Court and
19 Second Circuit have otherwise verbalized in a number of
20 opinions about the extent to which the Fourth Amendment
21 requires reasonableness. And here, the reasonableness
22 standard does not require a warrant.

23 THE COURT: Okay. Let me ask you some other
24 questions.

25 MS. SHAMI: Sure.

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1 THE COURT: To clarify, on Page 67 of your
2 opposition, the Government states that: No evidence would
3 be traced to the queries of NMEC extractions naming the
4 defendant. I want you to say it plain. Are you saying that
5 you didn't make any searches related to Ms. Salman, or just
6 that you didn't search her name?

7 MS. SHAMI: What we're saying is that the
8 Government did search her name. And that's itemized, not
9 itemized, that's reflected, excuse me, in the search warrant
10 that the Government sought in respect of her G-mail address.
11 The Government noted that it had run searches for her name.

12 The important piece of this is Judge DeArcy Hall
13 did an analysis in *Hasbajrami* where she traced the queries
14 to determine whether or not there was a Fourth Amendment
15 violation that collapsed with the warrant requirement which
16 the Government submits is not the correct way to have
17 analyzed that because the question of reasonableness and
18 whether a warrant is required are separate questions.

19 But putting that aside. So here, if you were to
20 analyze the queries that returned the inculpatory
21 information, the individuals named in those searches were
22 not the defendant. One of them was the defendant's
23 husband's real name, Myatollah Nerzad, and the other was
24 another investigative subject. And so, the question is, I
25 think it's a question that you started with, with respect to

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1 opposing counsel is: Does the query matter? And the query
2 does matter. The defendant cannot say that she has an
3 interest in the searches of other individuals' names that
4 are not her retrieving information. Those are separate
5 subjects. And while they are related to her because they're
6 family, that does not undo the fact that it's not her name,
7 it's not her e-mail address, it's not her Telegram UID.
8 Those are identifiers that would be related to her. But the
9 names of other people, she cannot drag them into the search
10 and say she has a Fourth Amendment interest in those
11 searches and that therefore that query was inappropriate and
12 violated *Hasbajrami* which, again, is very narrow on its
13 facts to §702, to FISA, and to particularly what happened in
14 *Hasbajrami* prior to the revisions of FISA subsequent to
15 *Hasbajrami*'s decision in the Circuit.

16 THE COURT: What does "related to" mean?

17 MS. SHAMI: I don't think that the Circuit defines
18 it. And as the Court notes, there are redactions. And so,
19 I do not want to suppose what "related" means, I don't know.

20 But I do think that if the defendant is saying,
21 any person who I am related to, if they're searched and some
22 information about me comes out, how does that comport with
23 Fourth Amendment standing? The defendant wouldn't have the
24 ability to say because it's just not appropriate and it's
25 been rejected. Well, I sent a message. I sent an e-mail to

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1 this person and that inculpatory e-mail or inculpatory
2 message sits on his phone and I have some standing to object
3 to a search that doesn't name me on the other person's
4 device. That's what's happening here. She has no -- it is
5 not her device and it's not her name being searched.

6 THE COURT: So you searched her name and nothing
7 came up?

8 MS. SHAMI: Yes, exactly.

9 THE COURT: Then you searched her husband's name
10 or the other subject's name and then her information about
11 her did pop up?

12 MS. SHAMI: Your Honor, the Government has a
13 number of subjects and the Government searches the names of
14 subjects and other identifiers.

15 As the Government noted with the military training
16 document, the photo that we discussed earlier, the
17 defendant's name is not on it. She is referred to by a
18 kunya that the Government did not know she had until they
19 were able to receive the translation in 2023 and then
20 confirm through G-mail returns and the defendant's own
21 statement that, in fact, it referred to her. So which is to
22 say that it makes sense that the Government wasn't able to
23 return that document in a search, it didn't refer to the
24 defendant by her name. It referred to her by a name that
25 the Government did not know until it found the document.

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1 And as the Government also noted in its brief, even if we
2 knew the kunya, we would not have been able to return the
3 search because it's handwritten Arabic. It would not have
4 rendered into text searchable Arabic to be able to find it.
5 In the same way that handwriting, someone's script
6 handwriting, if you try to render that into text recognition
7 and search it, you won't be able to get that information.

8 And so, here it just happened that the Government
9 received information showing that an Umm Katab Al Muhajir
10 received military-type training and they were able to
11 connect that kunya to the defendant.

12 THE COURT: Can you remind me. Is the Government
13 objecting to disclosing the queries?

14 MS. SHAMI: Yes, your Honor, we are.

15 THE COURT: Why?

16 MS. SHAMI: Your Honor, the searches that the
17 Government conducts, the Government doesn't typically share
18 those nor is it appropriate to share in this instance. As
19 the Government noted, the searches are done by agents, by
20 the Government, and are just trying to identify information
21 related to a number of subjects. And so, here, again, as
22 the Government notes, the fact of the matter is that the
23 searches that the Government conducted that retrieve the
24 inculpatory information didn't name the defendant. The
25 defendant has no entitlement to know all of the Government's

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1 subjects.

2 THE COURT: How am I to make a determination if
3 the searches were related to the defendant if you're not
4 disclosing the searches?

5 MS. SHAMI: I think that sort of puts the cart
6 before the horse because it assumes that the querying has to
7 be evaluated. And it's only being evaluated under
8 Hasbajrami's framework which is inapplicable here. The
9 question here is, does the defendant have standing and she
10 doesn't. The phone was retrieved abroad belonging to a
11 non-U.S. national ISIS terrorist.

12 THE COURT: I understand. And I don't mean to cut
13 you off. But if I disagree with you, that just because it
14 was -- if I disagree with you that the database, as you
15 represent, only contains information extracted by a foreign
16 entity and given to the U.S. and therefore the Fourth
17 Amendment doesn't necessarily doesn't apply, I need to know,
18 and we can assume that it's a dragnet, I think maybe the
19 defendant is saying they need more information to confirm
20 that it's a dragnet. If it's a dragnet, I need to know what
21 the queries were to understand if there was a Fourth
22 Amendment search, or there was a search that implicates the
23 Fourth Amendment.

24 MS. SHAMI: I think your Honor, again, that
25 assumes that four steps out, we get to a place where we are

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1 describing the NMEC database as a dragnet; and again,
2 imposing the *Hasbajrami* framework. I think the gating
3 question is, how was the information seized and searched
4 abroad? That is the operative question. It was seized
5 abroad. The Fourth Amendment does not apply
6 extraterritorially. Whatever the Government received from a
7 foreign partner, the Government is able to search. It does
8 not need to come back and get a warrant. That is
9 longstanding Supreme Court and Second Circuit.

10 And again, I also want to note that much of the
11 litigation in *Hasbajrami* was classified and ex parte and I
12 think that the classified portions, obviously, would provide
13 more information but that's not what we have here.

14 And so, it's also trying to not only shoehorn what
15 should just be a straight Fourth Amendment analysis into
16 *Hasbajrami* but it's the redacted version of *Hasbajrami*. And
17 I don't know how that sort of gets done because it is not
18 the full picture. And as both the Circuit and
19 Judge Darcy Hall noted, the facts of *Hasbajrami* are just
20 entirely unique to themselves. And the Government's view is
21 that the Fourth Amendment, with respect to standing, with
22 respect to foreign searches, with respect to
23 non-U.S. citizens, all of those things dictate that there
24 was no Fourth Amendment violation here.

25 THE COURT: Okay. Thank you.

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1 MR. PRICE: If I may?

2 I think the Government's focus here on collection
3 is absolutely misplaced. There is no question that there is
4 a difference between Section 702 surveillance and the
5 collection that took place here but that's irrelevant.

6 The Second Circuit determined that the §702
7 Program was lawful at the time. We are not challenging the
8 initial collection here.

9 I will note that the NSA surveillance, according
10 to *Hasbajrami*, the Second Circuit said that it occurred
11 where those communications were made from which would be
12 abroad in that case. But what we're talking about is the
13 step beyond collection.

14 THE COURT: Sorry. I understand your argument to
15 that point. But I just want to confirm I'm understanding
16 your argument.

17 The Government seems to be saying if it's seized
18 abroad by a foreign entity necessarily no Fourth Amendment
19 issue or incident you're saying.

20 MR. PRICE: With respect to the initial seizure,
21 that is correct. Can the Government go back and search that
22 information at will as part of a massive database, that is a
23 big no. That's the position that *Hasbajrami* explicitly
24 rejects and they do so for a number of reasons. They lay it
25 out and they talk about the fact that courts are

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1 increasingly recognizing the need for additional probable
2 cause or reasonableness assessments to search and to support
3 a search of information already lawfully collected.

4 I'm talking specifically about *Reilly versus*
5 *California*. Sure, you can seize the cell phone but you need
6 a warrant to actually search the contents. The Court looks
7 to the vast technological capabilities that this supported
8 this database. The size of it. The ability to have in that
9 case 250 e-mails annually, here we have 66 times that
10 amount. That that querying makes it easier to target
11 U.S. persons.

12 So the idea is that in Section 702 world and
13 *Hasbajrami*, the Court was willing to overlook the idea of
14 incidental collection of information about U.S. citizens for
15 foreign intelligence purposes. It's a different story when
16 you go back and query a database full of that information
17 because all of the bits and pieces that you are collecting,
18 you know, hundreds of thousands of cell phones. As the
19 Second Circuit says, you can stitch enough information
20 together about a person as if you had targeted them in the
21 first place.

22 And so, it's saying digital here is different.
23 This is not like a traditional cell phone search, it is
24 something different, and it is beyond collection.
25 Collection is not at issue here. We are not trying to map

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1 anything on to FISA. FISA is irrelevant to this case. The
2 question is the database of that collected material. And
3 the Second Circuit is saying you do not get to search at
4 will a massive database like that without additional
5 probable cause or reasonableness.

6 The search in this case. In the *Musaibli* case,
7 the Government puts on a witness who talks about how it is
8 very important for the Government to have all this
9 information stored for a later query. They are not looking
10 at in real-time. This is not supporting an ongoing
11 investigation but it is meant as reference, as a library, to
12 go back and search later and that is what happened here. It
13 is also what the Second Circuit was actually concerned about
14 in *Hasbajrami*. They're saying, we have more of a concern if
15 this is getting stored and searched later as opposed to
16 being passed along to the FBI in real-time.

17 So, here, we're dealing with a search of that vast
18 library of data. And the Government does not get to do that
19 at will under *Hasbajrami*. That much is clear.

20 Did your Honor have any other questions?

21 THE COURT: Did you have a response to the
22 Government's argument regarding the good-faith exception?

23 MR. PRICE: Yes.

24 The searches here were conducted in 2023.
25 *Hasbajrami* was decided by the Second Circuit in 2019. I

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1 think there was more than enough time between the search and
2 that decision coming down for the Government to recognize
3 that conducting a database search of even lawfully seized
4 material like this could potentially present a Fourth
5 Amendment concern.

6 The Second Circuit did not limit its discussion to
7 Section 702 except when, look, when we're dealing with
8 databases that are this massive, this is the analysis that
9 we have to go through. It wasn't dependent on the
10 particulars of Section 702. It was looking at, well, do we
11 have to have a different standard if we have, if we have a
12 database this massive as opposed to just going back and --
13 going back to the evidence locker and searching an
14 individual phone. Are we going to treat this differently?
15 And the Court said, yes, absolutely we are. And I think
16 that logic holds true one hundred percent here. We're not
17 talking about the initial collection about the lawfulness of
18 that collection. The question is, is the database
19 sufficiently similar? Does that database contain
20 information about U.S. citizens? Is it large enough to pose
21 a privacy problem if the Government were to be able to just
22 search it at any point in time? And the Second Circuit
23 absolutely rejected the Government's position here that they
24 can go back and lawfully search anything that they had
25 lawfully collected.

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1 THE COURT: If they searched her name and
2 nothing -- none of the evidence they're going to use came up
3 that they searched something else, and information about her
4 did come up, you would still say there is a Fourth Amendment
5 issue to exclude that --

6 MR. PRICE: Yes.

7 THE COURT: -- evidence?

8 MR. PRICE: In *Hasbajrami*, in Judge DeArcy Hall's
9 opinion, obviously, we have limited information about the
10 queries but its says it used terms associated with
11 defendant, with Hasbajrami. So other than his name. And I
12 think that is what we have here in terms of searches for
13 family members of Ms. Salman.

14 MS. SHAMI: Your Honor, I have three brief points
15 in response because they need to be responded to.

16 *Hasbajrami* does not stand for the principle that
17 as long as there is a database, the Government needs to get
18 a search warrant. The Government maintains databases like
19 N.Y.P.D., FBI, DNA. The Government does not need a warrant
20 to query a name or a DNA match against the DNA database.
21 This would impose a warrant requirement on every single law
22 enforcement database that simply does not exist. The
23 holding of *Hasbajrami* is not that broad.

24 The holding of *Hasbajrami* is specific to FISA and
25 §702 because FISA and §702 implicate the most sensitive data

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1 and a very controversial technique in collection. And the
2 sensitivities and the application completely scoped why the
3 Court ruled the way that it did in the Second Circuit and
4 how Judge DeArcy Hall applied that ruling in reaching the
5 queries with respect to *Hasbajrami*. And, again, even noted
6 that her decision has no precedential value apart from the
7 case at hand, it is because it is very specific. And so,
8 the idea that it should be applied in this way to any
9 database as long as it contains information about
10 U.S. citizens. DNA databases have information about
11 U.S. citizens, certainly they do, and its biometric
12 information about them, DNA information about them.
13 Information that potentially could connect them to other
14 individuals.

15 The notion that simply a database means there
16 needs to be a warrant does not comport with the Fourth
17 Amendment nor does it comport with *Hasbajrami*.

18 THE COURT: I guess there is no need for us to
19 keep going back and forth. But *Hasbajrami* focuses on the
20 size and the scope of the database. But you're saying it
21 doesn't matter how large the database is, that wasn't the
22 focus, the focus was on the sensitivity of the database?

23 MS. SHAMI: The sensitivity informed the concern
24 with respect to the size and the scope. But the sensitivity
25 was paramount, among all other factors, as to what was being

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1 collected.

2 And, your Honor, I do think that the defendant's
3 concession that the seizure abroad cannot be challenged is
4 just -- is reality. The Supreme Court has been very clear:
5 The Fourth Amendment's warrant requirement does not apply to
6 the search and seizure by United States agents of property
7 that is owned by a nonresident alien and located in a
8 foreign country. And that's *United States*
9 *v. Verdugo-Urquidez*, V-e-r-d-u-g-o hyphen U-r-q-u-i-d-e-z,
10 494 U.S. 259 in a 1990 case.

11 Here that is what happened...

12 THE COURT: I think we all agree, I think, that
13 the search or the seizure and the extraction isn't the
14 issue. The issue is when you put it all together into this
15 database that is massive. Well, we're presuming massive.
16 If it is a massive database, can you then go back and do a
17 search without a warrant?

18 MS. SHAMI: Again, the question is just limited to
19 the question of a database. And the Government submits that
20 a database is not the hallmark of whether or not a search
21 requires a warrant. The Government searches DNA databases
22 without a warrant. The FBI searches its own databases
23 without a warrant. It's information that is in the
24 possession of a database because, frankly, when you get a
25 DNA sample it gets input into a system.

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1 There is no holding in any court that requires a
2 warrant simply because there is a database. And the idea
3 that the material that is seized abroad from foreign
4 fighters, of terrorists, from Al-Qaeda, from ISIS has to be
5 searched pursuant to a warrant simply because it ended up in
6 a database is not supported by any law except the
7 defendant's attempt to impose *Hasbajrami*.

8 THE COURT: Only if you want to search a
9 U.S. citizen in the database. I don't think they're saying
10 any search, well, maybe I'm wrong but a search of a
11 U.S. citizen in this database.

12 MS. SHAMI: And I think --

13 THE COURT: Without reason.

14 MS. SHAMI: It also cannot be supported because,
15 again, the DNA database, the great example. If you search
16 the DNA database for a U.S. citizen, how is that any
17 different than what the defendant is positing here? The
18 only difference is the defendant is arguing, well, it's so
19 much bigger.

20 But size is not the determining factor here, the
21 question is the collection. And that is what was at issue
22 in *Hasbajrami*. The sensitivity of the data, sensitivity of
23 the collection. And that is just not at issue here with
24 devices belonging to foreign terrorists seized abroad.

25 Thank you, your Honor.

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1 THE COURT: Okay. So we have a few more motions
2 to get through. It's also 12:20. I'm happy to take a
3 15-minute recess and to come back to finish it.

4 MR. PRICE: Yes, your Honor. Thank you.

5 MS. SHAMI: Your Honor, would we be able to take a
6 20-minute break around 12:20? I have another --

7 THE COURT: It's 12:20.

8 MS. SHAMI: 1:20. As well.

9 THE COURT: So you want to keep going now?

10 MS. SHAMI: I think I would be happy to keep going
11 now just because I have another court appointment at 1:30
12 and I am happy to come back after.

13 MR. JACOBSON: If we can take maybe a five-minute
14 break?

15 THE COURT: Hopefully we'll get through at 1:20.

16 MS. SHAMI: That will be great.

17 THE COURT: Let's take a five-minute recess.

18 (A recess in the proceedings was taken.)

19 COURTROOM DEPUTY: All rise. Have a seat, please.

20 THE COURT: Is Ms. Salman with us?

21 MR. JACOBSON: Yes, she is.

22 THE COURT: Before I move on to the Bill of
23 Particulars, if anyone has any arguments to that motion I
24 did have one follow-up question for the Government regarding
25 the NMEC motion.

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1 And, as I understand it, as I believe I understand
2 your argument, you are differentiating between the
3 §702 database and the -- the §702 database and the NMEC
4 database.

5 You are saying the §702 database is sensitive.
6 And then you also brought up the DNA database which I assume
7 you would be arguing is not sensitive. And so, I'm
8 just -- and the NMEC database is not sensitive is what I
9 believe you're arguing is not a sensitive database.

10 How is the Court to determine what is a sensitive
11 database, what is not a sensitive database? Why is the DNA
12 database and the NMEC database not sensitive, but the
13 §702 database is? Are there any other sensitive databases
14 out there, or is it just §702 is a sensitive database?

15 MS. SHAMI: Your Honor, the §702 database, there
16 is nothing like it and that is really what guided the
17 Second Circuit. How information is collected. How the
18 Government has to submit those requests, those
19 authorizations, the minimization factors. The way that the
20 Government searches or the Government's request have to be
21 tailored. The way that they have to relate to a specific
22 purpose. It is because of the inherent sensitivity of the
23 information and the technique of collection that §702 stands
24 for apart from any other database. And there is just no
25 comparison between §702 and NMEC.

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1 THE COURT: So I understand. So there are
2 parameters that kind of guide how information is collected
3 for the §702 database and that is what makes it sensitive.
4 Is it just that that makes it sensitive so that no other
5 database could be sensitive, that no other database could be
6 sensitive?

7 MS. SHAMI: I don't know that no other database
8 can be sensitive. But I think that as the law currently
9 stands, the §702 database stands apart in terms of the
10 analysis and there is no other case that analyzes any other
11 database the way that it analyzes the §702 database. And
12 that is based on the specific framework, the sensitivities
13 of the collection, sensitivities related to the technique
14 and sensitivities of the information. It just stands apart
15 in every metric that the Second Circuit's decision really
16 focuses on those factors.

17 THE COURT: What does -- and I'm not -- what does
18 sensitive mean? Isn't there a universe where some of the
19 that NMEC would be similar to the information in the
20 §702 database. Would it not be...

21 MS. SHAMI: Your Honor --

22 THE COURT: Not the same but similar information
23 or similar data.

24 MS. SHAMI: Your Honor, the Second Circuit, I
25 think, went through a couple of ways in which information is

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1 collected with respect to §702 and FISA and the difference
2 between, I think, upstream and I can't remember the name of
3 the other variation and how that is affected, I mean, how
4 the information is otherwise seized. How it is -- also
5 implicates in instances other providers. It's just very
6 different and it also is a very controversial and highly
7 litigated database and statute, quite frankly.

8 FISA and §702 present very unique circumstances
9 about the Government's perspective as the Second Circuit
10 identified it, prospective real-time collection. And that
11 sensitivity is very different than just the device and I
12 don't have any case that I can think of that treats any
13 other database the way that the Second Circuit analyzes the
14 §702 database in Hasbajrami's circuit opinion.

15 THE COURT: Okay. All right.

16 MS. SHAMI: Could I also, your Honor, I'm trying
17 to -- I was messaging with the clerk for my other matter, I
18 know you want to go through the Bill of Particulars and
19 we're happy to answer any questions about any motions that
20 you may have. And we consulted with the defense if they had
21 any objection. But just so that I could potentially go also
22 meet the second obligation. If you wouldn't mind, if you
23 have any questions on Motion 73, that is the other -- that's
24 the third motion that I have that I would be responsible
25 for.

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1 THE COURT: Which one is 73?

2 MS. SHAMI: 73 is a motion to dismiss on the basis
3 of pre-indictment delay.

4 THE COURT: Okay. We can move to that one next.

5 Mr. Price is jumping up.

6 MR. PRICE: May I respond briefly?

7 THE COURT: Are you going to tell me what
8 sensitive means?

9 MR. PRICE: I will say this. The Section 702
10 database, at least as far as the *Hasbajrami* court was
11 concerned, involved a lot of e-mails. The NMEC database is
12 going to involve everything that is on a cell phone. So
13 it's e-mail, it's social media, it's photos, it's messaging.
14 And I believe the Government even said last time that this
15 is chock full of sensitive information; so, that was one of
16 the reasons for not wanting to give us the results.

17 But here, I think you can absolutely draw a
18 difference between COTUS and other databases. If we want to
19 talk about cell phones, the Supreme Court has said a warrant
20 is required upon arrest to take and search a cell phone but
21 not your DNA under *Maryland v. King*. See, *California v.*
22 *Reilly*. Cell phone data is considered highly sensitive.
23 That is exactly what we're talking about here and it is a
24 giant database 66 times of the §702 database.

25 THE COURT: Thank you.

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1 Let's move to -- was it 73 you said?

2 MS. SHAMI: Yes, your Honor.

3 And thank you for considering this application
4 from the Government.

5 THE COURT: No, of course. All right. Just a
6 moment.

7 So we're going to move to defendant's motion to
8 dismiss due to pre-indictment delay, ECF Number 73.

9 Mr. Jacobson, welcome.

10 MR. JACOBSON: Thank you, Judge.

11 THE COURT: Go ahead.

12 MR. JACOBSON: The relevant facts here are largely
13 undisputed. We know that in late 2016 early 2017,
14 Ms. Salman was trafficked into ISIS territory. We know that
15 in March of 2019, she surrendered to SDF forces in the town
16 of Baghouz in Northeast Syria. We know that she spent
17 approximately five years in the custody of the SDF in a
18 detention camp.

19 We also know from the discovery that in 2019 the
20 FBI opened an investigation into the Salman family. And as
21 early as June of 2019, law enforcement conducted an
22 extraction of Ms. Salman's husband's phone. And by August
23 2022, at the latest, the phone had been examined and a
24 report had been filed.

25 We know from reporting in the New York Times that

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1 in September 2023, the Government was working to repatriate
2 the Salman family. Yet, Ms. Salman was not charged with any
3 crime until May 2024, which was at least seven years since
4 the alleged conduct, although it depends on the timeframe
5 that we're looking at whether it's the complaint or the
6 indictment, and five years after the investigation was first
7 opened.

8 Now, the Government claims that the investigation
9 only began in 2022; yet, they also concede that they knew
10 that Ms. Salman was an American as early as 2019 when they
11 started interviewing members of Ms. Salman's family. We
12 have no idea why they waited three years to examine the
13 contents of the phone by their estimation.

14 And even if we use 2022 as a starting point of the
15 criminal investigation into Ms. Salman, that's still more
16 than two years prior to the arrest and indictment in this
17 case which itself would be an unconstitutional delay.

18 So I think, Judge, if any of the facts are
19 disputed, we would at the very last least need a hearing.
20 But due to the more than two-year delay, and by our
21 calculation, five-year delay in this case, the indictment
22 can be dismissed on the papers.

23 THE COURT: Do you have any proof to offer that
24 Ms. Salman has suffered an actual prejudice as a result of
25 the pre-indictment delay like witnesses or evidence that are

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1 now unavailable due to the delay?

2 MR. JACOBSON: Sure, Judge.

3 It's always hard to -- we don't know what we don't
4 know, right? And we have made numerous discovery demands on
5 the Government for documents, for witness testimony. But
6 what we do know is that after the fall of the Caliphate,
7 thousands of documents were destroyed. And it's the very
8 documents that we have asked the Government for and the
9 Government says that are not in their possession.

10 The case law --

11 THE COURT: What documents, can you be more
12 specific? You said you requested documents that were
13 destroyed, which documents?

14 MR. JACOBSON: Other training documents, for
15 example. We have received a few of them but the Government
16 now tells us that there were at least 900 women who signed
17 up just in Raqqa. We have a small handful of comparator
18 Nusaybah Khatiba documents, training documents, but also
19 sign-up sheets. The Government has also told us today that
20 they have sign-up sheets only for the training in Raqqa but
21 not for trainings that were held in alleged other locations.
22 And we have requested all of that.

23 It's relevant for us to show by omission that
24 Ms. Salman was not on any of the sign-up sheets. That she
25 was not on any of the other types of documentation that you

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1 would expect to see here. And so, that loss of documentary
2 evidence not only between, for example, 2018 and 2019 but
3 during the five years that Ms. Salman was sitting at
4 Camp Solihull in Rujj is substantial prejudice to her
5 ability to prepare a defense in this case.

6 THE COURT: And do you have anything to
7 demonstrate that this delay was an intentional device to
8 gain a tactical advantage over Ms. Salman?

9 MR. JACOBSON: I think there is circumstantial
10 evidence of that, sure. The ease and the speed with which
11 the Government was able to repatriate other Americans
12 suggests that they delayed in repatriating the Salman family
13 and Ms. Salman, specifically. We know for, for example, in
14 the *Musaibli* case, he only spent, I believe, six weeks in
15 SDF custody before the United States quickly repatriated him
16 for the purpose of prosecution and that included -- and they
17 had initiated their investigation prior to that so they were
18 able to do it quickly and efficiently. That's true of all
19 of the other repatriation cases that we are aware of since
20 it seems as if Ms. Salman is the last American to be
21 prosecuted after repatriation.

22 So there is just no explanation in this case of
23 why they were able to repatriate *Musaibli*, repatriate other
24 individuals in the Eastern District of New York, but were
25 unable to repatriate Ms. Salman despite knowing she was an

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1 American for years prior to that.

2 THE COURT: Okay. Anything in addition?

3 MR. JACOBSON: I think also as it prejudice, the
4 loss of essential witness testimony.

5 Witnesses who knew Ms. Salman in Syria could speak
6 to the fact that she hasn't been trained. Obviously, her
7 husband is the -- would be central to her defense here. We
8 don't know where he is. All these years later, it's --
9 we're significantly hindered in our investigation into
10 figuring out his whereabouts in this case. So there is
11 substantial prejudice to Ms. Salman and I think under the
12 case law, the indictment should be dismissed.

13 THE COURT: Regarding the husband. That example
14 of the husband being now unavailable or unable to locate
15 him, why would that be more due to the Government's delay
16 versus just where he is, his location, and what he is
17 alleged to be involved in?

18 MR. JACOBSON: Right.

19 Well, if the Government had repatriated Ms. Salman
20 in 2019, soon after March of 2019, the Government or the
21 defense likely would have been able to figure out whether he
22 had been captured by the SDF, which prison camp that he was
23 located at. And due to the passage of time, it seems that
24 the Government has no information on his whereabouts.

25 THE COURT: Thank you.

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1 MS. SHAMI: Thank you, your Honor.

2 I think that the brief in response outlines the
3 timeline and I don't want to rehash any of it unless your
4 Honor wants to go into it. But I think the fact of the
5 matter is that in 2019 ISIS collapsed, it was defeated. And
6 the idea that the Government when it seized the phone from
7 Abu Ali would have been able to instantaneously pick it out,
8 of all devices, identify who the persons are, identify who
9 the kunyas are, and connect them to the defendant in a way
10 that treated that investigation above all others is fantasy.

11 The Government did not know about the defendant
12 and did not open up an investigation until December of 2022.
13 That is not two years from when she was charged, that is
14 the -- that is 18 months, excuse me, from when she was
15 charged from December 2022 to May 2024.

16 And the Supreme Court and Second Circuit are clear
17 that the time that when you start counting is when the
18 Government, when the prosecutor believes, that he or she has
19 evidence of guilt. And if the Government believes that they
20 need evidence beyond a reasonable doubt, that is within the
21 prosecution's judgment to determine.

22 And it is not a question of, well, she was in the
23 camps and why wasn't she repatriated. Those are asides.
24 And, in fact, they are asides that are explained by
25 documents that the Government has previously produced and

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1 additional documents that the Government produced yesterday
2 showing that the defendant and her mother were in the camps
3 but were afraid of the Americans when they came to the
4 camps. That one of her sisters was in Rujj. Was
5 interviewed by the Americans and was concerned about being
6 deported and they asked for help from the brothers, which is
7 a reference to ISIS males, to prevent that.

8 The Salmans did not want to return to the
9 United States. They only decided to be repatriated and made
10 that request in 2023. It is not the Government's position
11 that it will by force repatriate people into the country
12 against their will. There was a request made and the State
13 Department honored that request.

14 THE COURT: What happened in December of 2022?

15 MS. SHAMI: That is when the Government opened up
16 its investigation into the defendant, in particular.

17 THE COURT: Is there something that caused that
18 investigation to be opened then versus earlier like when the
19 phone was first...

20 MS. SHAMI: Exactly. Right, your Honor.

21 When the phone was first seized, it was one phone
22 among thousands, right? That's what was happening. And, in
23 particular, as the Government's evidence showed, this was
24 part of an operation called "Operation Goalie" where the
25 defense, excuse me, not the defense, where the Government of

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1 the SDF was seizing phones from ISIS fighters and supporters
2 as part of the Battle of Baghouz which went over for two
3 months. Thousands of devices were collected. And then they
4 had to be routed to Iraq to be extracted and assessed. And
5 then information from that intelligence gathering was being
6 sent out to law enforcement.

7 So, in August 2019, five months after the seizure
8 of the phone, that is when the Government understands we
9 received the first sort of item from the Abu Ali phone which
10 is the certificate of marriage between Abu Ali and the
11 defendant noting that they were married. That did not
12 initiate the investigation. The fact that she married an
13 ISIS fighter is not in and of itself a reason to initiate an
14 investigation in this case and that's not what happened.

15 Instead, later on, the Government received a photo
16 book as part of the ongoing review in connection with a
17 search of a subject that is not the defendant and they
18 received a photo book of photos from the Abu Ali phone. And
19 on that phone, were pictures of the defendant with the ISIS
20 flag, with the AK-47 and that is what prompted the opening.

21 THE COURT: So that was around December of 2022?

22 MS. SHAMI: I believe so. I have the timeline in
23 the brief and I can refer you specifically to the pages.

24 Again, at that point, the Government, the FBI, had
25 not understood the import of the military training document

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1 because they requested the full Gold Copy. But as the
2 Government noted in its brief, most of the documents are in
3 Arabic or German; that requires translation. And so, they
4 requested translations. And it was not until August or
5 September of 2023 when they received the translation of the
6 military training document that indicated that Abu Ali's
7 wife, who they now know he had two wives, received training.
8 So then they have to determine which of his wives is
9 Umm Katab Al Mujahir.

10 Google returns, and the defendant's own admission
11 during a November 2023 interview, gave the Government that
12 information. And so, frankly, if you were to start counting
13 as to when the Government had evidence of a crime to seek
14 charges really would be November 2023 when the defendant
15 admits that's her kunya and we have the training document.
16 So counting from November 2023 until May 2024, it is about
17 six months. And, frankly, at that point, the repatriation
18 was pending and was being handled by the State Department
19 separate and apart from the FBI. The FBI has nothing to do
20 with the State Department's processes for adjudicating
21 repatriation requests and whatever procedures need to happen
22 in advance of that.

23 More than that, when the repatriation flight
24 happens implicates all sorts of issues including security.
25 At the time, in early 2024, there were a lot of, I don't

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1 know how to describe them, but there were military
2 happenings related to some other countries nearby that would
3 have impacted the Government's decision to send a plane out
4 there for repatriation. The safety of both the Government
5 and the Salman family was at issue, frankly. And so, this
6 issue that the Government can immediately repatriate anybody
7 just does not comport with reality. And frankly, the
8 Government did not initiate its investigation until 2022,
9 the end of 2022, and did not form the basis for charges
10 until the end of 2023 and that is when the Government
11 submits the Court should start counting.

12 THE COURT: Thank you.

13 Shall we move to the Bill of Particulars if
14 defense counsel has anything that you want to add to your
15 papers?

16 MR. JACOBSON: I do. Briefly, your Honor.

17 And I won't belabor what's already in the briefing
18 but I do want to address briefly a number of new facts that
19 came up earlier today at argument.

20 I think starting from the premise, and this goes
21 to the timeline, and what we know about the timeline in the
22 case. The complaint says that Ms. Salman received military
23 training in or around March of 2018 which appears to be
24 based on the metadata of the photograph of the document.
25 But the indictment returns several days later walks that

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1 back and we don't know why. It has an unusually wide date
2 range saying that Ms. Salman was trained somewhere in Syria
3 somewhere between July 2017 and February 2019.

4 Why the backpedaling? We don't know whether we
5 have to defend against an allegation that Ms. Salman was
6 trained in March 2018 or that Ms. Salman was trained on any
7 day between July 2017 and February 2019. We simply don't
8 know from the discovery or from the complaint or the
9 indictment in the case.

10 The discovery, while voluminous, lacks a lot of
11 critical detail about the date, nature, and location of the
12 training. We have no photographs of the training, no
13 videos, no map, no location data of the training, no
14 information about the timing or the date of the training.
15 And we don't know what it entailed or who the trainers were.

16 But I think importantly, earlier today, the
17 Government -- we had assumed that the trainings that
18 occurred in Raqqa during the siege of Raqqa during July and
19 October of 2018. The Government today, for the first time,
20 without producing any discovery that points to this fact,
21 tells us that, actually, trainings also occurred in Hajin in
22 Al Barrakah; in Mayadin in Iraq, and possibly other places
23 as well. So which actually, I think, makes the fact that
24 the indictment says "Syria" all the more broad because we've
25 now just been told that there were numerous locations in

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1 Syria where Ms. Salman may have been trained. We have no
2 idea where the Government actually believes that she was
3 trained, they haven't told us.

4 The Government also says today that they'll be
5 turning over sign-up sheets from for 900 women in Raqqa. We
6 don't know if we will be receiving sign-up sheets for the
7 trainings in other locations. We don't know how the
8 Government intends to prove that there were trainings in
9 other locations and we've received no discovery about
10 trainings in other locations.

11 THE COURT: So you haven't received any discovery
12 that tells you where any trainings took place?

13 MR. JACOBSON: No.

14 THE COURT: Okay.

15 MR. JACOBSON: Now, the Government says that we
16 say that Ms. Salman was never in Raqqa. But it's also not
17 clear if the Government credits that. Do they think that
18 maybe Ms. Salman was trained in Raqqa? Again, we simply
19 don't know because we haven't been told or given any
20 discovery that speaks to that.

21 We also learned today for the first time that the
22 Government doesn't know who Umm Yousef is which creates
23 additional questions and perhaps we'll have to supplement
24 our motion for a Bill of Particulars. But we no longer have
25 any idea who trained Ms. Salman. Was it Umm Yousef herself,

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1 whoever Umm Yousef might be. Was it some other individual
2 that trained Ms. Salman and Umm Yousef is just the
3 fictitious or individual who signed the document. Again, we
4 don't know. It's as if, Judge, as to location, if this were
5 a gun possession case, an indictment would not say,
6 "Defendant possessed a gun in New York or California or
7 Pennsylvania or Florida," and that's essentially by proffer
8 only what the Government is doing today. That it was
9 somewhere in Syria perhaps in Raqqa, perhaps in these
10 new -- these other alternative locations that we know
11 nothing about. And it's just -- it would be insufficient in
12 any other case and it's insufficient in this case, too.

13 THE COURT: It's not so much of them saying that
14 the defendant possessed a gun in the Eastern District of New
15 York even if they don't tell me it was Queens or Brooklyn,
16 why is that not similar?

17 MR. JACOBSON: The reason that that's usually
18 sufficient is the discovery will include more specificity,
19 right? We'll receive surveillance footage that shows a
20 certain corner where an possessed a gun or we'll receive
21 some other evidence that narrows that location range.

22 So, without discovery that includes more
23 specificity, an indictment that says, "Somewhere in the
24 Eastern District of New York" would not be sufficient. But
25 even the Eastern District of New York is a much narrower

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1 location than saying, "Somewhere in Syria," or "Somewhere in
2 the extraterritorial jurisdiction of the United States." It
3 could be anywhere.

4 THE COURT: Okay.

5 MR. JACOBSON: And so, I think an indictment that
6 says "Eastern District of New York" is only saved where the
7 complaint or the discovery includes facts that allow the
8 defense to investigate further as to the location.

9 THE COURT: Why do you need to know more at this
10 time, a more specific location in order to prepare a
11 defense?

12 MR. JACOBSON: Because we don't know if we're
13 defending against an allegation that she was trained in
14 Raqqa and we should be focusing our investigation on that
15 city.

16 I think the Government can't proceed to trial with
17 the theory that she was trained somewhere in Syria at some
18 time. It's impossible for us to focus our investigation
19 without more specifics, right? We can't interview witnesses
20 who were in Raqqa and in Mayadin and in Iraq and in Hajin.
21 It's simply impossible for us to do or to focus, for
22 example.

23 And as to the sign-up sheets that the Government
24 was mentioning earlier. If there were 900 women, well,
25 should we assume that the fact that Ms. Salman is not on the

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1 Raqqa sign-up sheets, does that mean she wasn't trained in
2 Raqqa? The fact that the Government isn't producing sign-up
3 sheets for the other places that they claim trainings were
4 held, trained in those other those other locations, we just
5 don't know because the Government has not produced discovery
6 that speaks to that but they haven't proffered any more
7 specific facts.

8 THE COURT: Is the location issue less of a issue
9 if it's narrow to March 2018. And I know you said that
10 they've walked that back. But if it is narrowed to
11 March 2018 is the broad location less of an issue?

12 MR. JACOBSON: We don't know where Ms. Salman was
13 in March 2018. So if the Government says -- we need to have
14 both the location and the timeframe. Because if we know
15 that if the Government is saying Ms. Salman was trained in,
16 as an example, Mayadin in March of 2018 but we can establish
17 that Ms. Salman was not in Mayadin in March 2018, that would
18 be a complete defense to the charges.

19 So we have to be able to marry up the location and
20 the timeframe. But we have neither here because we have
21 Syria. And then, again, using the sort of gun possession
22 analogy, we have somewhere in the United States between
23 July 2017 and February 2019, the defendant possessed a gun.
24 That would be insufficient in both respects.

25 THE COURT: Okay.

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1 MR. JACOBSON: The location and the timeframe.

2 And I think, finally, the case law supports some
3 narrowing of the date range and location here. We cited *Ray*
4 in our motion. I think *Musaibli* is also instructive. I
5 think that was a 30-plus month timeframe that the judge
6 ordered the Government to narrow.

7 And *Augustine* and *Pugh*, which the Government
8 relies on heavily, are just inapposite in this case. Those
9 are cases that charge inchoate attempt crimes where the
10 Government just has to show intent and a substantial step.
11 And I know that in both of those cases there was discovery
12 that was produced that laid out in great detail what those
13 steps were, where they occurred, how they occurred.

14 And, you know, finally, I think timeline and
15 location were just never an issue in those cases. It was
16 very clear where and when the attempts were alleged to have
17 occurred.

18 THE COURT: Thank you.

19 MR. REICH: Your Honor, as the Government made
20 clear in its motion, in its opposition to the defendant's
21 motion, the Government has provided ample information under
22 the law around Bill of Particulars here.

23 It is important to understand that the Government
24 cannot be compelled to disclose through a Bill of
25 Particulars the manner in which it will attempt to prove the

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1 charges, the precise manner in which a defendant committed
2 the crime charged or give a preview of its evidence and
3 legal theories.

4 In this case, the Government has given more than
5 enough information for the defendant to be able to defend
6 against these charges. The question is not whether
7 additional information would be helpful, the question is
8 whether additional information would be necessary. And, in
9 this case, the Government is more than entitled to proceed
10 to trial on a theory that allows multiple theories of
11 liability here.

12 It is not the case, your Honor, that the
13 Government backpedaled on anything. An indictment
14 oftentimes has a broad date range. In this case, we have a
15 much more specific date range in the complaint. And we have
16 relayed to the defense multiple times through discovery and
17 in our papers in other contexts in this case, and to the
18 Court, that it is most likely that the timeframe during
19 which the training occurred had to have happened after the
20 marriage to Abu Ali which happened in July 2017, and no
21 later than March 2018 which is the metadata on when the
22 photo of the training document was taken. Mr. Jacobson
23 mentioned something along the lines of 30 months as an
24 appropriate range of time; this is much narrower than that.

25 So, your Honor, the Government would posit that

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1 not only was the date range more than narrow enough for the
2 defendant to be able to defend the case but also the other
3 elements that the Government has already provided.

4 So, for example, your Honor, with respect to the
5 location. Multiple cases in the terrorism context involve
6 either indictments or charging -- other charging instruments
7 or a Bill of Particulars which rise to the highest level of
8 specificity being just a country where a particular thing
9 happened. The Government cited examples from the
10 defendant's own cases where a Bill of Particulars identified
11 that training happened or material support happened in
12 Afghanistan or material support happened in Pakistan. And
13 in this case, identifying that it happened in Syria is more
14 than sufficient, your Honor.

15 THE COURT: In those cases, did they give a more
16 narrow timeframe?

17 MR. REICH: Your Honor, I'm not sure that
18 timeframe was at issue in the way that it is in this case.
19 But I will make two points on that question, your Honor.

20 The first is that, obviously, the defendant has
21 the best access to information of any of the parties. The
22 defendant knows where she was. The defense has repeatedly
23 said that if we don't identify exactly what days and times
24 and specific locations the trainings happened and who
25 trained, et cetera, that they have no way of defending

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1 against the case because they don't know where their client
2 was. But, of course, your Honor, the defendant knows better
3 than anyone where she was at any given particular time.

4 THE COURT: I mean, I think Mr. Jacobson made a
5 good point. If they were presuming it was going to be Raqqa
6 but now Ms. Salman is presumably not on that list, does that
7 necessarily mean it's not Raqqa, or does it just mean that
8 she wasn't on this list?

9 MS. SHAMI: Your Honor, that's a fair question.
10 The defendant stated unequivocally that she was not in Raqqa
11 during that timeframe.

12 THE COURT: During what time frame? In March 2018
13 or between July 2017 and March 2018?

14 MR. REICH: Our understanding was that he was not
15 in Raqqa at any time during that entire timeframe. And so,
16 defense counsel can certainly make assumptions based on the
17 information they have available to them from their own
18 client that the Government has also produced back to them
19 through her own statements.

20 THE COURT: And so, now you're saying, or
21 Ms. Shami said earlier, that there is multiple other
22 locations. The way for Raqqa they could say she was never
23 in Raqqa. But if they don't know what these other
24 possibilities are, how can they make that similar argument
25 that she was never there if that is an argument to be made.

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1 MR. REICH: Your Honor, that can certainly be
2 fleshed out at trial. But there is no requirement that the
3 The Government specifically point out exact locations. If
4 the Government's theory is that based on the overwhelming
5 evidence she certainly received military-type training
6 during a period of time in a general location. There is
7 nothing about the elements of this offense that require any
8 more specificity than that. And the defendant is free to
9 argue before the jury that the evidence is not strong
10 enough; that the evidence doesn't meet the standards. But
11 that doesn't mean that the Government is not permitted to
12 proceed at the level of extraction that the evidence shows.

13 And the Government would posit to your Honor that
14 this is not at all like a case where if -- a §922(g) case
15 with a gun. As your Honor identified, in that case, they
16 could simply say that it is within the Eastern District of
17 New York. And there is nothing about those cases in any
18 event that require evidence that the gun was held in a
19 particular place at a particular address. If the
20 overwhelming evidence in that case proves beyond a
21 reasonable doubt that the defendant was, in fact, in
22 possession of a gun illegally, there is nothing about the
23 statute that requires a showing that you demonstrate what
24 particular place it happened in other than, as your Honor
25 identified, the venue. And, obviously, in that case, there

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1 are issues of interstate commerce that are not relevant
2 here.

3 So, in this case, the Government has more than
4 posited evidence and provided discovery, and also provided
5 information in its detailed charging documents that give
6 more than enough information to meet the elements of this
7 particular offense that don't require any more specificity
8 than what the Government has already provided. And if the
9 defendant wants to argue to the jury that we haven't been
10 specific enough, then the defendant is free to do that.

11 THE COURT: How many training locations are there
12 or were there?

13 MR. REICH: That's not something the Government
14 knows specifically, your Honor. We understand there were
15 multiple locations but we don't have any more specific
16 information than that.

17 THE COURT: And to the extent you know, when
18 you're saying "multiple," are you saying two or you saying
19 15. What range are we thinking?

20 MR. REICH: Your Honor, the Government is aware of
21 a handful, three or four.

22 THE COURT: Okay. Those three or four are
23 identified in discovery or will be identified in the
24 discovery that you're -- or the discovery you gave
25 yesterday, those three or four?

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1 MR. REICH: That either is clear or will be made
2 clear. It's certainly not something that the Government is
3 hiding from defense counsel.

4 And another point I want to make sure the Court
5 understands, your Honor. Counsel has sort of implied that
6 the Government has some specific evidence that it's keeping
7 from counsel so that -- and without which they can't defend
8 the case. The Government is not hiding information about
9 its allegations in this case. We are providing that
10 information and they have ample information about the
11 charges.

12 THE COURT: Thank you.

13 MS. SHAMI: Thank you.

14 THE COURT: Shall we move --

15 MR. JACOBSON: Very briefly, Judge.

16 I think the Government has made it impossible for
17 us to even to provide alibi notice in this case which is
18 required under the Federal Rules because we don't know where
19 and when they allege Ms. Salman to have been trained. And
20 now the Government is saying yet another claim they have no
21 idea how many trainings there were. Maybe three or four,
22 maybe more. So it just enables the Government to pivot in
23 their theory. If Ms. Salman says I was in Mayadin on a
24 certain date in her testimony, then the Government says, oh,
25 well, it just happens to be that there was a training in

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1 Mayadin or in Iraq or in Hajin or in other cities in
2 Al Barrakah. We have no way of defending against it. And
3 we have not received any discovery that shows these
4 alternate locations. Maybe the Government expects to
5 produce it but we don't have it yet.

6 THE COURT: Okay.

7 MR. JACOBSON: It's certainly something that we
8 have moved to compel and I think it's essential for our
9 defense. But I think, like, even the Government's -- the
10 Government continues to use this hedging language that makes
11 it impossible for us to defend against.

12 The Government just stated that, and I want to get
13 the wording right, most likely that Ms. Salman was -- that
14 her training most likely probably happened after her
15 marriage to Abu Ali in July 2017. And the Government says
16 that as if they're offering us some narrowing of the
17 timeframe and scope here. But the indictment already uses
18 July 2017 as the earliest date. It essentially says that,
19 at some point, during the time that Ms. Salman was in Syria,
20 she was trained in some location and that's all we know and
21 to makes it impossible to defend at trial.

22 THE COURT: Okay.

23 MR. REICH: Your Honor, if I could briefly
24 respond?

25 I just want to make it clear that at least a

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1 couple of the other training locations are clear from
2 discovery that has already been produced including other
3 documents that were stamped that counsel has referred to
4 themselves. But, to be clear, it is not the case that the
5 Government is going to simply create stories that Ms. Salman
6 was in a particular place based on statements that come out
7 in trial as Mr. Jacobson suggested. That's just simply not
8 the order of operations. The Government has a theory that
9 based on a document, it is clear beyond any doubt, and
10 that's what we're presenting at trial; that at some point in
11 that narrow timeframe, in a particular general location, the
12 Government will argue to the jury that it is clear that she
13 received military-type training based on this evidence that
14 we have.

15 THE COURT: Okay.

16 MR. JACOBSON: Can I respond very briefly?

17 THE COURT: Sure.

18 MR. JACOBSON: It is not true that the discovery
19 we have to date shows locations of other trainings. The
20 training document itself does not list the location. I
21 think what the Government is referring to is the stamps on
22 the documents that do have stamps, unlike Ms. Salman's, that
23 have a stamp from various other directorates in other
24 provinces in Syria.

25 The Government's own theory in their briefing is

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1 the stamp is only added by the directorate in the province
2 where the training document is routed.

3 So to the extent the stamps have location
4 information in them, those are not locations of training,
5 those are locations of the directorate that received the
6 training certificate.

7 THE COURT: Okay. Can we move to ECF 74?

8 Ms. Shami, do you need to be excused?

9 MS. SHAMI: Actually, I requested from the Court
10 if they would allow me to meet later with them.

11 THE COURT: Okay.

12 MS. SHAMI: I can remain at the hearing here.

13 THE COURT: Happy to have you.

14 ECF 74.

15 MS. EISNER-GRYNBERG: Sorry, Judge, ours don't
16 have the ECF markings.

17 THE COURT: "Motion to Dismiss the Indictment
18 Pursuant to Nondelegation Doctrine."

19 MR. JACOBSON: I'm back up, Judge, on this one.

20 THE COURT: I don't mean to cut off what I am sure
21 was going to be a very eloquent argument.

22 Let me just preface by saying I am quite skeptical
23 of this argument in large part because of the district
24 courts within this circuit and some courts outside this
25 circuit have rejected it. And I understand your position, I

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1 understand your argument fully, and I understand the
2 academic sources you rely on, and this is a very interesting
3 academic argument, but what case law can I rely on for this
4 point?

5 MR. JACOBSON: That's a good question. And I
6 think it's in some ways we have to sort of intuit what the
7 Supreme Court would do in a case like this because the
8 nondelegation case law has not addressed a situation like
9 this where Congress has delegated the authority to impose
10 criminal liability to the Executive Branch, right? There
11 just hasn't been a case like that so we have to look at, I
12 think, the --

13 THE COURT: You mean this particular statute about
14 the training or do you mean to any criminal case? Because
15 isn't there a similar situation in cases where a person
16 provides material support, isn't it the same issue?

17 MR. JACOBSON: There are district court decisions
18 in that context in criminal cases.

19 THE COURT: I see.

20 MR. JACOBSON: District court cases.

21 THE COURT: So you want me to be the first?

22 MR. JACOBSON: I want you to be the first and I
23 think the reason --

24 THE COURT: To take down the statute and the whole
25 principle?

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1 MR. JACOBSON: Yes. I believe that the Supreme
2 Court will uphold the district court's decision in that
3 regard because they have already signaled in cases like
4 *Gundy* and *FCC versus Consumers Research* that the context of
5 the statute is important and have also signaled that the
6 nondelegation concerns are heightened in the criminal
7 context, specifically, where the delegation creates criminal
8 liability.

9 And I want to just address what I think is the
10 Government's conflation of the grounds on which other
11 district courts have denied challenges to §2339(b) and the
12 ground on which we're challenging §2339(d).

13 Our objection is not with Section 1189 which
14 authorizes the Secretary of State to delegate an FT0, we
15 have no issue with that. There are other purposes that
16 FT0 -- other reasons why FT0 delegation -- why FT0 -- like,
17 essentially why FT0 -- FT0s serve functions in other context
18 in government. The problem here is that Section 1189 is
19 incorporated into a criminal statute, thus creating criminal
20 liability in §2339(d). And I think the Government has
21 conflated that. I think other district courts that have
22 looked at the issue have conflated that and that is our --
23 that is the thrust of our challenge here today.

24 THE COURT: So you take this -- just confirming --
25 you also take issue with the Intelligible Principle

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1 entirely?

2 MR. JACOBSON: Yes.

3 THE COURT: Okay.

4 MR. JACOBSON: And the reason we have an issue
5 with that is, I think, again, district courts that have
6 looked at §2339(b) have not had the opportunity to address
7 recent FTO designations. And I think the recent
8 designations of drug cartels, for example, highlights the
9 fact that there is no outer bound in the delegation because
10 Congress provided no principle by which the Secretary of
11 State makes these decisions. And the fact that the
12 Secretary of State willy-nilly can say I am now designating
13 a drug cartel. I am now designating a gang or some other
14 organization as an FTO really proves the point.

15 THE COURT: But there are bounds but you just kind
16 of disagree with how they applied those bounds with these
17 gangs; correct, or no?

18 MR. JACOBSON: There is a principle that's
19 articulated in §1189.

20 THE COURT: You just think they're not following
21 it?

22 MR. JACOBSON: Right. And there is no meaningful
23 judicial review of designation of ISIS or a cartel or any
24 other organization.

25 THE COURT: Okay.

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1 MR. REICH: Your Honor, I won't belabor this.

2 Just to say that the Government agrees that the
3 law of this court is bound by is the law in existence now,
4 not what it believes the Supreme Court might one day do.

5 And I also just want to note that with respect to
6 §1189, it's not clear to me how this is different from
7 §2339(b), material support context. In those cases, they
8 rely on the definition in §1189 just as much as it does
9 here, and those are criminal cases just as much as here.
10 And every single court to look at those cases has all
11 reached the same conclusion.

12 THE COURT: Thank you.

13 MS. SHAMI: Thank you, your Honor.

14 THE COURT: Can we move to Ms. Salman's motion to
15 suppress statements at ECF 77.

16 MS. EISNER-GRYNBERG: Judge, we're prepared to
17 rest on the written record. If the Court has any questions
18 on this, I'm happy to answer them.

19 THE COURT: No questions.

20 MS. EISNER-GRYNBERG: Thank you.

21 MR. REICH: That's fine for the Government, your
22 Honor.

23 THE COURT: I think that is everything.

24 Ms. Shami, I gave you an assignment earlier. What
25 did I ask you to provide?

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1 MS. SHAMI: Yes, your Honor.

2 You asked for a best efforts affidavit in
3 connection with the efforts to locate the original.

4 THE COURT: Yes.

5 MS. SHAMI: And you had also given me the
6 assignment, or I had taken it upon myself, to give you a
7 case citation I finally did find while I was sitting here
8 which was the *Bourjaily* case that said you can look to the
9 document itself.

10 THE COURT: The hearsay?

11 MS. SHAMI: Yes, exactly.

12 THE COURT: I think you gave me that citation
13 already.

14 MS. SHAMI: I did.

15 THE COURT: Best efforts affidavit, how much time
16 do you need?

17 MS. SHAMI: I would need to just connect with the
18 agents because I don't know personally every single person
19 who might have run the search and all the details of that,
20 so three weeks?

21 THE COURT: Sure.

22 COURTROOM DEPUTY: August 28th.

23 MS. SHAMI: Thank you.

24 THE COURT: Mr. Jacobson, regarding the Bill of
25 Particulars, I believe did you say that you may, after

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1 getting discovery, the discovery yesterday or some upcoming
2 discovery, you may want to amend your motion?

3 MR. JACOBSON: I think we may have to, Judge.
4 We'll consider that internally and we can advise the Court.

5 THE COURT: Can I set a deadline for three weeks
6 from today for you to either amend your motion or not.

7 MR. JACOBSON: So long as the Government provides
8 the additional discovery before that.

9 THE COURT: I noticed they disclosed -- you did a
10 discovery production yesterday; is that correct?

11 MS. SHAMI: Yes, your Honor we did.

12 But, in particular, the documents where there are
13 indications that there were 900 women who signed up. And I
14 think they've been referred together as the sign-up sheets.
15 I haven't actually seen the underlying documents, so I won't
16 call it a "sign-up sheet" but documents that reflect that
17 over 900 women in Raqqa during the specific time period
18 sought to sign up. That is on a hard drive that I'm
19 currently seeking, that we are currently seeking the
20 authority to produce to the defendants. And so, we've made
21 that request, that request is pending. And hopefully, it's
22 very quick because we believe that it's been released to
23 another team. And so, hopefully, there isn't any kind of
24 overlap that needs to happen. But as soon as we have it, we
25 will be able to produce it but I can't give you a specific

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1 time because I just don't know.

2 THE COURT: I'm not going to give you a deadline,
3 then, Mr. Jacobson.

4 MR. JACOBSON: Thank you, Judge.

5 THE COURT: After you receive the discovery,
6 within a week of receiving the discovery, can you just let
7 the Court know whether you intend to amend the motion and
8 then I'll set a schedule for that.

9 MR. JACOBSON: Yes, absolutely, Judge.

10 And to be clear, we're not asking the Court to
11 defer judgment on the motion. We can always file a second
12 motion for Bill of Particulars.

13 THE COURT: I see. Okay.

14 I wanted to note last before we adjourn, Counsel
15 for the Government makes a sealing request in a footnote in
16 its opposition to defendant's pretrial motions that's at
17 Note 30.

18 To the extent the request is a motion, I'm going
19 to deny that request with leave to renew. And the
20 Government should make a motion for leave to file under seal
21 on the docket in accordance with the Local Rules and a
22 memorandum of law in support of such request.

23 Anything additional before we adjourn?

24 MS. EISNER-GRYNBERG: No, Judge. Thank you.

25 MR. REICH: Thank you, Judge. Nothing from the

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1 Government.

2 MS. SHAMI: Thank you, your Honor.

3 THE COURT: Thank you for your preparation today.

4 We're adjourned.

5 (WHEREUPON, this matter was adjourned.)

6

7 * * *

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9 CERTIFICATE OF REPORTER

10

11 I certify that the foregoing is a correct transcript of the
12 record of proceedings in the above-entitled matter.

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16 

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18 Anthony D. Frisolone, FAPR, RDR, CRR, CRI
19 Official Court Reporter

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